TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899

No. 38.

WILLIAM McCUSKQUODALE, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

FILED OCTOBER 14, 1899.

(20,610.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 253.

WILLIAM McCORQUODALE, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

INDEX.

	Original.	Print.
Caption	1	1
Agreement as to omission of certain papers from the transcript to the Supreme Court	2	1
Transcript from lower court to court of criminal appeals	3	2
Index	3	2
Caption	5	4
Presentation of indictment	5	4
Indictment	5	4
Judgment	6	5
Charge of the court	7	6
Order of court overruling motion for new trial, &c.	15	10
Sentence	16	11
Assignments of errors	17	11
Request to forward transcript to Austin	27	18
Clerk's certificate	28	19
Order of original submission	29	19
Original opinion of the court	30	20
Judgment of affirmance	42	28
Order overruling appellant's motion for rehearing	43	28
State's motion for rehearing and to reform and correct judgment and to transfer	44	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 7, 1907.

	Original.	Print.
Order of court transferring transcript and all papers from Tyler to Austin	45	30
Appellant's exception and answer to the State's motion to reform and affirm	46	31
Order transferring cause from Austin to Tyler	50	34
Opinion of court on State's motion to reform and correct judgment	51	34
Dissenting opinion of Davidson, presiding judge	60	40
Judgment of court reforming and affirming judgment of lower court	65	43
Appellant's motion for rehearing upon judgment reforming and affirming	67	45
Order overruling appellant's motion for rehearing upon judgment reforming and affirming	80	53
Petition for writ of error	81	54
Fiat of Presiding Judge Davidson granting writ of error	85	56
Assignments of error	86	57
Clerk's certificate	91	59
Original writ of error	92	60
Citation in error	93	61

1 *Caption.*

Be it remembered, at a term of the Honorable Court of Criminal Appeals of the State of Texas, begun and holden at Tyler, on the second day of October, A. D. 1905, and which adjourned on the twenty-first day of December, A. D. 1905, (Present Hon. W. L. Davidson, Presiding Judge, and Judges J. N. Henderson and M. M. Brooks); and, at a term of the Honorable Court of Criminal Appeals of the State of Texas, begun and holden at Tyler, on the first day of October, A. D. 1906, and which adjourned on the twentieth day December, A. D. 1906, (Present Hon. W. L. Davidson, Presiding Judge, and Judges J. N. Henderson and M. M. Brooks); the following cause came on for trial, to-wit:

No. 3499.

WILLIAM MCCORQUODALE, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Brazos County.

2 *Agreement.*

In the Court of Criminal Appeals of the State of Texas.

No. 3499.

WM. MCCORQUODALE, Plaintiff in Error,
v.
THE STATE OF TEXAS, Defendant in Error.

In the above entitled case, it is hereby stipulated by the attorneys for the parties thereto, a writ of error having been granted therein to the Supreme Court of the United States, that the Clerk of the Court of Criminal Appeals, in making a transcript of the record, may omit therefrom the following papers and record, to-wit:

1. The Statement of facts.
2. The bills of exception.
3. Motion for new trial.
4. Amended motion for new trial.
5. Issue taken by the State on motion for new trial.
6. Defendant's replication.
7. Original motion for rehearing by appellant in Court of Criminal Appeals.
8. Amended motion for rehearing of appellant in Court of Criminal Appeals.

And that an order may be entered, if the same to the Court shall seem proper, in accordance with this stipulation.

Dated February 21st, 1907.

ANDREWS, BALL & STREETMAN,
Attorneys for Wm. McCorquodale, Plaintiff in Error.

F. J. McCORD,
Assistant Attorney General, Attorney for the State of Texas, Defendant in Error.

Filed February 23, 1907.
E. B. WIGGINS,
Clerk Court of Criminal Appeals, Tyler, Texas.

3 *Index.*

Caption	Page	1,	Line	1
Presentation of Indictment	"	1	"	10
Indictment	"	1	"	17
Judgment	"	2	"	10
Statement of Facts	"	3	"	1
Testimony of Ida McGrew	"	3	"	6
Letter No. 1	"	7	"	21
" " 2	"	7	"	30
" " 3	"	8	"	8
" " 4	"	9	"	1
" " 5	"	9	"	24
" " 6	"	10	"	1
" " 7	"	10	"	12
" " 8	"	10	"	26
" " 9 (Ida McGrew to Def't)	"	11	"	1
" " 9 (Answer to above)	"	11	"	10
Testimony of Ham South	"	11	"	18
Dr. Harrison	"	11	"	29
Cam Jones	"	12	"	14
Nelson Gray	"	13	"	19
D. Mathis	"	13	"	31
Cole Spell	"	15	"	28
W. G. Mitchell (on dying stat'm't)	"	16	"	34
M. Nagle do.	"	17	"	28
Dr. Emory, "	"	18	"	25
Cole Spell (recalled)	"	19	"	4
W. G. Mitchell	"	21	"	3
Lee Moseley	"	22	"	5
Mrs. L. Moseley	"	23	"	8
C. E. Jenkins	"	23	"	29
Joe Hearn	"	24	"	15
Victor White	"	24	"	33
Lamar Bethea	"	25	"	15
Mrs. L. Bethea	"	26	"	23

Miss C. Jenkins		Page	27,	Line	8
T. J. Closs	(For Def't)..	"	27	"	27
Mrs. D. D. Dawson	" ..	"	28	"	3
R. M. Nall	" ..	"	28	"	22
Mrs. J. McCorquodale	" ..	"	30	"	1
J. C. Bennett	" ..	"	30	"	21
Ellen Green	" ..	"	31	"	11
Dr. Butler	" ..	"	31	"	26
Zack Franklin	" ..	"	32	"	14
Cornelius O'Neal	" ..	"	32	"	20
T. P. Boyett	" ..	"	32	"	34
J. W. Barron	" ..	"	33	"	29
A. W. Buchanan	" ..	"	34	"	32
Mr. Hyak	" ..	"	36	"	18
J. E. Butler	" ..	"	36	"	24
A. G. Board	" ..	"	37	"	3
W. H. Olliver	" ..	"	38	"	3
Cole Spell (recalled)		"	40	"	19
W. Wippreche (State)		"	40	"	27
Elder Crain ..		"	41	"	3
J. W. Payne		"	41	"	27
Tom Spell		"	42	"	2
Blunt Andrews		"	42	"	18
A. Worley		"	42	"	32
P. M. Hicks		"	43	"	10
D. McCorquodale (Def't in Rebut)		"	43	"	25
arge of the court		"	44	"	24
lls of Exception		"	51	"	4

Index—Cont'd.

ll of Exception (Cont'd).	Page.	Line.
No. 1	51	4
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		

Motion for New Trial	100	19
1st Amended Motion for New Trial	101	1
Issue Taken by State on Motion for New Trial	115	32
Defendant's Replication	120	11
Motion to Set Aside Verdict and Judgment	129	10
Order Allowing Time to File Statement of Facts	129	27
Sentence	129½	1
Assignment of Errors	129½	28
Request to Forward Transcript to Austin	139	1
Clerk's Certificate	140	1

5 *Caption.*

THE STATE OF TEXAS, *County of Brazos:*

At a term of he District Court begun and holden within and for the county of B zos, at Bryan, on the 6th day of March, A. D. 1905, and which adj rned on the 15th day of April, A. D. 1905, the Hon. J. C. Sco judge thereof, presiding, the following cause came on for trial, to-wit:

No. 4283.

THE STATE OF TEXAS, Plaintiff,
v.
WM. MCCORQUODALE, Defendant.

Presentation of Indictment.

Filed Mar. 10, 1905.

MARCH 10TH, 1905.

Now on this day the grand jury came into open court and a quorum being present through their foremen presented and delivered to the Judge of the Court, in open Court, the following bill of indictment, which was thereupon ordered to be filed, to-wit:

No. 4283.

THE STATE OF TEXAS
vs.
——— ———.

Indictment.

Filed March 10, 1905.

In the Name and By the Authority of the State of Texas: The Grand Jurors, good and lawful men of the State of Texas, County of Brazos, duly tried on oath by the Judge of the District Court of said County touching their legal qualifications as Grand Jurors,

elected, impaneled, sworn and charged at the March Term, 1905, of the District Court of Brazos County, Texas, and anterior to the presentment of this indictment, to inquire into and true presentment make of all offenses against the penal laws of said State, committed within the body of the County aforesaid, upon their oaths present in the District Court of said County, that William McCorquodale, late of the County of Brazos, on the 7th day of December, in the year of our Lord one thousand, nine hundred and four with force and arms in the County of Brazos and State of Texas, did then and there unlawfully, with malice aforethought kill Henry Spell by shooting him with a gun, against the peace and dignity of the State.

ED CRENSHAW,
Foreman of the Grand Jury.

Filed March 10th, 1905.
FRANK CROUCH,
Dist. Clerk.

6 Endorsements: No. 4283. The State of Texas *vs.* William McCorquodale, Indictment. Offense. Murder. Filed March 10th, 1905. Frank Crouch, Clerk.

Judgment.

No. 4283.

THE STATE OF TEXAS
vs.
WILLIAM MCCORQUODALE.

MARCH 27TH, 1905.

This day this cause was called for trial, and the State appeared by her District Attorney, and the defendant, William McCorquodale, appeared in person, his counsel also being present, and the said defendant, William McCorquodale, having been duly arraigned, and both parties announced ready for trial, and the defendant, William McCorquodale, in open Court pleaded not guilty to the charge contained in the indictment herein; thereupon a jury, to-wit: J. H. White and eleven others, were duly selected, empaneled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the court, retired in charge of the proper officer to consider of their verdict, and afterwards on April 1st were brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open Court the following verdict:

We, the Jury, find the defendant guilty of murder in the first degree and assess his punishment at confinement in the State penitentiary for life.

J. H. WHITE, *Foreman.*

7 *Charge of the Court.*

Filed Apr. 1st, 1905.

In the District Court of Brazos County, Texas, March Term, A. D. 1905.

No. 4283.

THE STATE OF TEXAS
vs.
WILLIAM MCCORQUODALE.

GENTLEMEN OF THE JURY:

In this case the defendant William McCorquodale stands charged by indictment with the offense of the murder of Henry Spell alleged in the indictment to have been committed by the defendant William McCorquodale in the County of Brazos and State of Texas, on or about the 7th day of December, A. D. 1904. To which charge the defendant has pleaded "Not Guilty."

I give you in charge, as the law applicable to this case, the following:

1. Every person with sound memory and discretion, who shall unlawfully kill any reasonable creature in being, within the State with malice aforethought, either express or implied, shall be deemed guilty of murder.

2. Murder is distinguishable from every other species of homicide, by the absence of circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide.

3. Malice is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed, or words spoken.

4. Malice, which is absolutely essential to constitute the offense of murder, is either express or implied.

5. All murder committed with express malice, is murder in the first degree.

6. Express malice, which is absolutely essential to constitute murder in the first degree, is where one with sedate, deliberate
8 mind and formed design unlawfully kills another.

7. When an unlawful killing is established, the condition of the mind of the party killing, at the time, just before and just after the killing, is an important consideration in determining the grade of the homicide; and in determining whether murder has been committed with express malice or not, the important questions for a jury to consider are: do the facts and circumstances in the case at the time of the killing, and before and after that time, having connection with or relation to it, furnish satisfactory evidence of a sedate and deliberate mind, on the part of the person killing, at the time he does the act? and do these facts and circumstances show a

formed design to take the life of the person slain, or to inflict on him some serious bodily harm, which, in its necessary and probable consequences, may result in his death? or, do the facts and circumstances in the case show such a general reckless disregard of human life as necessarily includes the formed design against the life of the person slain? If they do, the killing, if it amounts to murder, will be upon express malice.

8. In order to warrant a verdict of murder in the first degree, malice must be shown by the evidence to have existed; that is, the jury must be satisfied from the evidence, beyond a reasonable doubt, that the killing was a consummation of a previously formed design to take the life of the person killed, and that the design to kill was formed deliberately, with a sedate mind, that is at the time when the mind of the person killing was self-possessed and capable of contemplating the consequences of the act proposed to be done. There is, however, no definite space of time necessary to intervene between the formed design to kill and the actual killing; a single
9 moment of time may be sufficient; all that is required is that the mind be cool and deliberate in forming its purpose and that the design to kill is formed.

9. When the evidence satisfies the mind of the jury, beyond a reasonable doubt, that the killing was the result of a previously formed design by the defendant to kill deceased, and that the design was formed when the mind was calm and sedate and capable of contemplating the consequences of the act proposed to be done by him, and such killing is further shown to have been unlawful and done with malice, then the homicide is murder in the first degree, and your verdict should be rendered accordingly.

10. To warrant a conviction of murder in the first degree, the jury must be satisfied by the evidence, beyond a reasonable doubt, that the defendant, before the act, deliberately formed the design with a calm and sedate mind to kill the deceased; that he selected and used the weapon or instrument reasonably sufficient to accomplish the death by the mode and manner of its use. The act must not result from a mere sudden, rash and immediate design, springing from an inconsiderate impulse, passion or excitement, however unjustifiable and unwarrantable it may be.

11. Now if you believe from the evidence, beyond a reasonable doubt, that the defendant William McCorquodale did, as charged in the indictment, with express malice aforethought, with a gun being a deadly weapon, or instrument well calculated and likely to produce death, by the manner in which it was used, with a sedate and deliberate mind and formed design to kill, did unlawfully shoot with a gun and thereby kill said Henry Spell you will find him guilty of murder in the first degree, and so state in your verdict, affixing the penalty therefor.

10 12. The punishment for murder in the first degree shall be by death or by confinement in the State penitentiary for life, as the jury may determine and state in their verdict.

The next lower grade of culpable homicide than murder in the first degree is murder of the second degree. Malice is also a neces-

sary ingredient of the offense of murder in the second degree, the distinguishing feature, however, so far as the element of malice is concerned, is: that in murder in the first degree, malice must be proved to the satisfaction of the jury, beyond a reasonable doubt, as an existing fact, while in murder in the second degree malice will be implied from the fact of an unlawful killing.

Implied malice is that which the law infers from or imputes to certain acts, however suddenly done: thus when the fact of an unlawful killing is established, and the facts do not establish express malice beyond a reasonable doubt, nor tend to mitigate, excuse or justify the act, then the law implies malice, and the murder is in the second degree; and the law does not further define murder in the second degree, than if the killing is shown to be unlawful, and there is nothing in evidence on the one hand showing express malice, and on the other hand there is nothing in evidence that will reduce the killing below the grade of murder, then the law implies malice, and the homicide is murder in the second degree.

The instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears.

11 If you believe from the evidence, beyond a reasonable doubt, that the defendant, upon his implied malice aforethought with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use in a sudden transport of passion, aroused without adequate cause, and not in defense of himself against an unlawful attack, reasonably producing a rational fear or expectation of death or serious bodily injury, with the intent to kill, did shoot with a gun and thereby kill Henry Spell as charged in the indictment, you will find him guilty of murder in the second degree, and assess his punishment at confinement in the State penitentiary for any period that the jury may determine and state in their verdict, provided it be for not less than five years.

By the expression adequate cause as used in the preceding paragraph is meant such as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection.

Should you find the defendant guilty of murder in the first degree, or guilty of murder in the second degree, you will state of which degree of murder, and for whatever offense you may find him guilty, you will affix the punishment for that crime as above directed.

If from the evidence you are satisfied, beyond a reasonable doubt, that the defendant is guilty of murder, but have a reasonable doubt, whether it was committed upon express or implied malice, then you must give the defendant the benefit of such doubt, and not find him guilty of a higher grade than murder in the second degree.

12 You are charged in this case that you will not consider the alleged dying declarations of the deceased, Henry Spell, admitted in evidence unless you believe from the evidence, be-

yond a reasonable doubt, that the time the said declarations were made that the deceased, Henry Spell, was of a sane mind, conscious of approaching death, and believed there was no hope of recovery and that said alleged statements were made voluntarily, and not in response to interrogatories calculated to lead deceased to make any particular statement or statements. But in this connection I charge you that it would be no legal objection to said alleged declarations that questions were asked him directing his mind to the subject, or part of the subject upon which said declarations were made (if they were made).

You are instructed that if you do not consider the alleged dying statements of deceased under the preceding paragraph of this charge, then you are instructed that in that event the State in this case would rely for a conviction in this case wholly upon circumstantial evidence.

In order to warrant a conviction of a crime upon circumstantial evidence each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt, all the facts (that is the facts necessary to the conclusion) must be consistent with each other and with the main facts sought to be proved; and the circumstances, taken together, must be of a conclusive nature leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged.

It is not sufficient that the circumstances coincide with, account for, and therefore render probable, the guilt of the defendant.
13 They must exclude to a moral certainty every other reasonable hypothesis except the defendant's guilt, and unless they so do beyond a reasonable doubt you will find the defendant not guilty.

Among other defenses set up by the defendant is what is known in legal phraseology as an Alibi; that is, that if the offense was committed, as alleged, then the defendant was, at the time of the commission thereof, at another and different place from that where such an offense was committed, and therefore was not and could not have been the person who committed the same.

Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the offense was committed at the time of the commission thereof, you will find the defendant "Not Guilty."

In this case the defendant has not testified and you are instructed that you will not consider his failure to testify as a circumstance against him nor will you allude to or consider it in any way.

The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence, beyond a reasonable doubt; and in case you have a reasonable doubt as to the defendant's guilt you will acquit him, and say by your verdict "Not Guilty."

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

J. C. SCOTT, *Judge.*

In addition to the foregoing instructions I now charge you as to your conduct:

During your deliberations in this case you will not converse with or communicate with any person not of your jury, nor will you discuss, consider or even allude to any matter, person, or issue not in evidence in this case, and a violation of this instruction will subject you to punishment by the court.

J. C. SCOTT, *Judge.*

Endorsement: No. 4283. State of Texas *vs.* William McCorquodale. Charge of Court. Filed Apr. 1st, 1905. Frank Crouch, District Clerk, Brazos Co., Texas.

Order Overruling Motion to Set Aside Verdict and Judgment.

Order Overruling Motion for New Trial.

In District Court of Brazos Co., Texas, March Term, 1905.

No. 4283.

THE STATE OF TEXAS
vs.
WILLIAM MCCORQUODALE.

APR. 15, 1905.

On this the 15th day of April, A. D. 1905, came on to be heard the motion of the defendant, William McCorquodale, to set aside the verdict and judgment herein rendered and grant him a new trial of this cause, and the State being present in court by her District Attorney, and the defendant William McCorquodale being present in Court in person, and the Court having heard the said motion, and the evidence thereon submitted is of the opinion that the same should be refused; it is therefore considered, ordered and adjudged by the Court that the said motion for a new trial herein be and the same is refused, and in all things overruled. Whereupon the defendant, Wm. McCorquodale in open Court excepted and in open court gave notice of an appeal herein to the Court of Criminal Appeals of Texas, which said notice is now here entered of record; it is further ordered and adjudged by the Court that the said Wm. McCorquodale be and is hereby granted twenty days after the adjournment of this Court within which to prepare and file his bills of exceptions.

Order allowing 20 days to file statement of facts & bills of exception.

Sentence.

Apr. 15, 1905.

No. 4283.

THE STATE OF TEXAS
vs.
WILLIAM MCCORQUODALE.

APRIL 15TH, 1905.

This day this cause being again called, the State appeared by er District Attorney, and the defendant, William McCorquodale as brought into open Court in person, in charge of the Sheriff, is counsel also being present, for the purpose of having the sent- nce of the law pronounced against him in accordance with the erdict and judgment herein rendered and entered against him on former day of this term; and thereupon the defendant, William IcCorquodale, was asked by the Court whether he had anything o say why sentence should not be pronounced against him, and he nswered nothing in bar thereof, whereupon the Court proceeded, the presence of the said defendant, William McCorquodale, to ronounce sentence against him as follows:

It is the order of the Court That the defendant, William Mc- Corquodale, who has been adjudged to be guilty of Murder in the First degree, and whose punishment has been assessed by the ver- dict of the jury at confinement in the penitentiary for life, be de- livered by the Sheriff of Brazos County, Texas, immediately to the Superintendent of the Penitentiaries of the State of Texas or other person legally authorized to receive such convicts, and the said William McCorquodale shall be confined in said Penitentiaries for life, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said William McCorquodale s remanded to jail until said Sheriff can obey the direction of this entence.

Assignment of Errors.

Filed May 3, 1905.

In the District Court of Brazos County, Tex., this 24th Day of April, 1905.

No. 4283.

STATE OF TEXAS
vs.
WILLIAM MCCORQUODALE.

Now comes the defendant, William McCorquodale, in the above entitled and numbered cause, and assigns the following errors upon which he relies for a reversal of this cause.

1.

The Court erred in not postponing the selection of the jury from the special venire until 18 of said veniremen, who were duly summoned and who were absent from Court, could be attached and brought into Court, and in forcing defendant to trial in the absence of such veniremen.

2.

The Court erred in permitting the State to challenge for cause A. B. McSwain, one of the special venire, after said juror had been examined touching his qualifications by both sides, and after he had been accepted by the State.

3.

The Court erred in permitting Ida McGrew, the State's witness to testify over objections of defendant, that on the ocasion the defendant tried to induce her to leave the house in which she was then living, and for which deceased was paying the rent, and that defendant said to her that if she did not move he would burn up everything she had.

4.

The Court erred in permitting the State, over the objection of defendant, to introduce in evidence the following letter, to-wit:

BRYAN, TEXAS, *Sept. 26th,* 1904.

IDA: Henry Spell, the cowardly puppy, have got them notes I wrote you taking them around showing them. A man is that low down is sorrier than the lowest negro in town. Now you give the pup this note I want him to see it. He can't face a man he is so sorry.

"Mc."

5.

The Court erred in permitting the State to introduce in evidence, over objections of defendant, the following letter, to-wit:

BRYAN, TEXAS, *Sept. 22nd,* 1904.

DEAR ONE: I han't seen you in a long time. It seems like a year to me. can't I come down and talk to you a while to-night? I will give you my word and honor I won't bother you for nothing else. I want to have a talk with you. Ida I can come at any hour of the night you say so now nobody else would no it. please darling let me come tonight, if it was you begging me to do anything I would do it if it cost me my life. Don't say you can't come tell me to come just this time and if you don't want me to I won't bother you any more.

Bye, bye, "Mc."

6.

The Court er-ed in permitting the State to introduce in evidence, over objections of defendant, the following letter, to-wit:

BRYAN, TEXAS, *Sept. 10th,* 1904.

IDA: I am going to write a few lines. What I want you to do is forgive me for the way I have treated you. I acknowledge I ve done you mighty wrong, and I take back every word I said you and I don't ask you to take me back. I have done you to mean but I acknowledge it and you ought to forgive me. It was because I love you so I done it and always will. Ida I lie and dream of you at night. Now Ida I want you to friends with me and Ida, if you need anything any time or want orse and buggy let me know Won't cost you one cent but I don't k you to do anything but forgive me for what I have done to u. I blame myself with everything and you with nothing and a I never will have another woman for you are the only woman ever loved. I would cut my right arm off for you. Now Ida ad this good and see if you can't forgive me. That is all I ask r I know I have treated you to mean but I have repented a ousand times. If I could call it back I would not do it for a ousand dollars and I want you to forgive me and you have got true friend. I want you to speak to me whenever you meet me. ow Ida I acknowledge I have done you wrong and will do anything in the world you say just for you to forgive. I ain't written is note to start up written and bothering you some time today when ou get time just write a few lines and let me know if you will rgive for what I have done and I won't bother you any more and you need a friend at any time I will be one to you and a true e and I noe one but me knows how I love you.

Good Bye, "Mc."

7.

The Court erred in permitting the State to introduce in evidence, er defendant's objections, the following letter, to-wit:

BRYAN, TEXAS, *June 17th,* 1904.

IDA: I want to see you and talk to you. Ida I was mad last night, course, and you would not talk to me and I had enough to make me mad, you know. But Ida if you will do right I will do right I will forgive you for everything and I believe you will me. I love you better than all the world put together and I want to see you can't you come to-night. Darling, I ill send the buggy after you and we can talk everything over. la, my sweet little darling, come to-night and talk to me for am crazzy to kiss you sweet little lips and we won't have a cross ord, even if we can't agree and you can get a house over here ow and it would be best for you to move at once. I want you come to-night and let me tell you all about it and did you ask at old lady about the restaurant. Let me know what she said. f you can't come tonight, Come to-morrow night but please, Darng, come to-night. I would come to you if it was you to ask me at way if I had to crawl. Let me know if you will come by Earl nd I will send him after you in a buggy. Please come darling.

Bye, Bye, "Mc."

8.

The Court erred in permitting the State to introduce in evidence, over the objections of defendant, the following letter, to-wit:

BRYAN, TEXAS, *June 29th*, 1904.

IDA: I want to come to see you to-night without fail. I want to talk with you and I want you to let me out or Henry Spell one for I want to see you every night myself and I don't want to come without you telling me. You need not be afraid of him. He knows better than to harm you just come right out and tell me if I can come to-night and every night and I will tend to him not bothering you. Did you get something to eat. Let me hear from you at once, Ida, I did not believe you said them things about me —— kind and sweet baby at aule I have just sent a bill to Henry to collect.

"Mc."

21

9.

The Court erred in permitting the State to introduce in evidence, over objection of defendant, the following letter, to-wit:

BRYAN, TEXAS, *Sept. 5th*, 1904.

DEAR IDA: I want to know if I can come and see you to-night. Please let me know. I know we can make everything square. Now be good and tell me to come. I will treat you nice. Don't treat me so cruel, dear one, for you are so dear to me, I can't live without you. Be certain to answer this and ancer right.

As ever yours, "Mc."

10.

The Court erred in permitting the State to introduce in evidence, over objection of defendant, the following letter, to-wit:

BRYAN, TEXAS, *June 18th*, 1904.

IDA: I am going to write you this one note. Ida, now if you will turn that fellow loose I will give you more than he makes. He ain't worth a damn and I will fix you up. Ida, I said a heep to you but it was because I love you so hard. If you wus to get sick he could not do anything for you and if you will drop him he can't bother you at all and you come here this evening or to-night and talk to me like a little lady and I won't say a cross word to you. Be certain to come and if you don't want me to I won't never come around you any more nor say a word about that ten dollars any more. Now let me know if you will come and what time.

"Mc."

22

11.

The Court erred in permitting the State to introduce in evidence, over objection of defendant, the following letter, to-wit:

BRYAN, TEXAS, *Sept. 7th*, 1904.

IDA: Now you say you are a lady and I am a gentleman, now I will try you. I will send my surrey after you to-night at dark and we will go and get the clothes and then to-morrow you can move, now is that alright: Let me know. It won't take us long and then I am going to stay with you after we come back to-night, now let me know if that is alright and I will go and take the house this evening. Answer. "Mc."

I send you some paper to write on.

12.

The Court erred in permitting the State to introduce in evidence, over objections of defendant, the following letter, to-wit:

DEAR ONE: I am sorry I was not here last night when you came. I didn't get off until half after two. Come down to-night. Come early I sure want to see you bad. Be sure and bring me my basket, please.

Yours as ever, "IDA."

(Over.)

IDA: I have got to go to the bottom this evening and I want you to go with me if you is well again. I want you to go this evening with me let me hear from you at once for I have got to go.

"WM. Mc."

23 13.

The Court erred in refusing to allow the witness, Cam Jones, to testify that the deceased, Henry Spell, sent a message by him to Zack Franklin that if he, Franklin, did not cease his visits to Ida McGrew that he, Spell, would kill him.

14.

The Court erred in allowing the witness, Cole Spell, to testify as to the alleged dying statement of deceased.

15.

The Court erred in allowing the witness, G. W. Mitchell, to testify as to the alleged dying statements of deceased.

16.

The Court erred in refusing to allow defendant to prove by the witness, Dr. G. W. Emory, that he heard the deceased repeatedly state that he recognized the defendant as the man who fired the fatal shot by the flash of the pistol, and that he never heard deceased say anything in regard to a light from a lamp.

17.

The Court erred in submitting to the jury in the charge the question as to whether or not the proper predicate had been laid for the admission of the alleged declarations of deceased.

18.

The Court erred in not charging the jury that if they had a reasonable doubt as to the truth of the alleged dying declaration then the State would also rely wholly upon circumstantial evidence, the Court having previously instructed the jury that if they did consider the alleged dying declarations of the deceased under the foregoing charge, that then and in that event the State would rely wholly upon circumstantial evidence for a conviction.

24 19.

The Court erred in charging on the weight of the evidence, indicating in its charge to the jury that if they believed the proper predicate had been laid for the introduction of the alleged dying declarations, then they would have to take and consider same as evidence in the case.

20.

The Court erred in instructing the jury as follows: "You are charged in this case that you will not consider the alleged dying declarations of deceased, Henry Spell, admitted in evidence unless you believe from the evidence beyond a reasonable doubt, that at the time said declarations were made the deceased, Henry Spell, was conscious of approaching death and believed there was no hope of recovery, and that said alleged dying statements were made voluntarily, and not in response to interrogations calculated to lead deceased to make any particular statement or statements. But in this connection I charge you that it would be no legal objection to said alleged dying declaration that questions were asked him directing his mind to the subject upon which said declarations were made (if they were made).

21.

The Court erred in failing to charge the jury that the State in this case relied for a conviction wholly upon circumstantial evidence without qualifying said charge, it being apparent that the State did not rely upon the alleged dying declaration of the deceased as made by him, but undertook to aid said declaration by circumstantial evidence as to the existence at the time and place of the homicide a light from a lamp as a means whereby the deceased might have seen the person doing the shooting.

25 22.

The Court erred in charging the jury as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant upon his implied malice aforethought, with a deadly weapon or instrument reasonably calculated and likely to produce death by

the mode and manner of its use, in a sudden transport of passion aroused without adequate cause and not in defense of himself against an unlawful attack reasonably producing a rational fear or expectation of death or serious bodily injury, with intent to kill, did shoot with a gun and thereby kill Henry Spell, as charged in the indictment, you will find him guilty of murder in the second degree and assess his punishment at confinement in the State penitentiary for any period that the jury may determine and state in their verdict provided it be for not less than five years.

23.

The Court erred in the charge to the jury in not further charging the jury that if they believed from the evidence that the defendant went to the house where the deceased was killed, without any intention of killing deceased and that while there he saw deceased and Ida McGrew together (the State's theory being that deceased and defendant were rivals in the pursuit of the affections and carnal favors of Ida), and that this circumstance and sudden and unexpected meeting produced a sudden transport of passion, not arising from adequate cause, and in this condition of mind he shot deceased, he would only be guilty of murder in the second degree.

24.

The Court erred in charging the jury as follows: "The instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending. 26 If the instrument be one not likely to produce death it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears."

25.

The Court erred in charging the jury as follows: "You are instructed that if you do not consider the alleged dying statements of deceased, under the preceding paragraph of this charge, then you are instructed in that event the State in this case would rely for a conviction in this case wholly upon circumstantial evidence."

26.

The Court erred in failing to instruct the jury upon the issue of manslaughter.

27.

The Court erred in not granting a new trial because of the misconduct of the attorney representing the State in asking the following question of the witness, R. M. Nall: "Is it not a fact that the defendant is an old poker player and not easily excited?"

28.

The Court erred in not granting a new trial because of the prejudice of one of the jurors, W. P. Burkhalter, who qualified on *voir dire* as a fair and impartial juror, without prejudice against defendant, the contrary being unknown at that time to the defend-

ant or his attorneys, and who was shown to have remarked prior to the trial that, in effect, that any white man who would write such letters as defendant did to a negro woman ought to have his damn neck broke or be hung; this remark being made on his being shown the letters introduced in evidence on this trial, neither defendant or his attorneys having learned of said statement until after the trial of this case, and defendant not having exhausted his per-
27 emptory challenges at the time said juror was accepted.

29.

The Court erred in refusing to grant defendant a new trial be cause the evidence is insufficient to sustain the verdict.

A. G. BOARD,
BUTLER & DOREMUS, AND
J. G. MINKERT,
Attorneys for Defendant.

Endorsements: No. 4283. The State of Texas *vs.* William Mc Corquodale. Assignment of Erros. Filed May 3rd, 1905. Frank Crouch, Dist. Cl'k Brazos County, Texas.

Request to Clerk to Forward Transcript to Austin.

In the District Court of Brazos County, Texas.

Filed May 9/05.

No. 4283.

THE STATE OF TEXAS
vs.
WILLIAM MCCORQUODALE.

To Frank Crouch, Esq., Clerk of said Court:

You will please forward the transcript in the above styled and numbered cause direct to the Court of Criminal Appeals of Texas now in session at Austin, when you shall have the same ready to forward.

Respectfully,
A. G. BOARD,
DOREMUS & BUTLER, AND
28 J. B. BROCKMAN,
Counsel for Defendant.

Endorsement: No. 4283. The State of Texas *vs.* William Mc Corquodale. Defendant's request to forward transcript direct to Austin. Term of Court of Criminal Appeals. Filed May 9th, 1905 Frank Crouch, Dist. Cl'k Brazos County, Tex.

Clerk's Certificate.

THE STATE OF TEXAS, *County of Brazos:*

I, Frank Crouch, Clerk of the District Court of said County do hereby certify that the foregoing transcript contains a true copy of all the proceedings in said above entitled and numbered cause.

Witness my signature and seal of office on this the 12th day of May, A. D. 1905.

(Signed) FRANK CROUCH,
Clerk of the District Court of Brazos County, Texas.

Endorsements: No. 4283. William McCorquodale, Appellant, *vs.* The State of Texas, Appellee. From Brazos County, District Court, A. D. 1903. Filed in Court of Criminal Appeals at Austin, Texas, May 20, 1905. E. P. Smith, Clerk. Filed in Court of Criminal Appeals at Tyler, Texas, Sept. 7, 1905, E. B. Wiggins, Clerk. Filed in Court of Criminal Appeals at Dallas, Texas, Jan. 6, 1906, J. M. Gaston, Clerk. Filed in Court of Criminal Appeals at Austin, Texas, April 7, 1906, E. P. Smith, Clerk. Filed in Court of Criminal Appeals at Tyler, Texas, 9/10/06, E. B. Wiggins, Clerk.

29 *Order of Original Submission.*

Be it remembered, at a Term of the Honorable Court of Criminal Appeals of the State of Texas, begun and holden at Austin, on the Third day of April, A. D. 1905, (present Hon. W. L. Davidson, Presiding Judge, and Judges J. N. Henderson and M. M. Brooks,) in the cause of

No. 3499.

WM. MCCORQUODALE
vs.
THE STATE OF TEXAS,

Brazos County,

the following orders were made:

June 24, 1905, taken under advisement and transferred to Tyler.

May 31, 1905. Submitted on briefs and oral arguments for both parties.

I, E. P. Smith, Clerk of the Court of Criminal Appeals of the State of Texas, at Austin, hereby certify that the foregoing is a true copy of the orders made by this Court in the above entitled and numbered cause.

In Witness whereof, I hereunto set my hand and affix the Seal of said Court, at Austin, this 26th day of June, A. D. 1905.

[SEAL.] E. P. SMITH, *Clerk.*

30 *Opinion. Dec.* 20, 1905.

Opinion.

No. 3499, 4th Assignment.

Wm. McCorquodale, Appellant,
vs.
The State of Texas, Appellee.

Appeal from Brazos County.

Appellant was assessed a life term imprisonment in the penitentiary under conviction of murder in the first degree.

Bill of exceptions number one complains of the action of the court refusing to postpone the selection of the jury until certain named jurors could be attached and brought into court. The court says in explanation: "The court heard the evidence of the sheriff as to where the said jurors resided, and ascertained they lived from 8 to 20 miles from the court-house. Instanter attachments for said jurors were issued, and the motion overruled. Before defendant was required to pass on any talesmen all of said jurors with the exception of one or more were brought into court, and after the jury were finally empaneled defendant had not exhausted his challenges." There was no error in this. It has been frequently decided.

Another bill complains that the juror, McSwain had been tested as to his qualification, and accepted by the State, and before the defendant passed upon him he called attention to the fact, that they had not inquired of him as to whether or not he had conscientious scruples in regard to inflicting the death penalty. Upon inquiry the juror stated he had, and the State then challenged him for cause. This was not error. He could not be considered a juror in the case until he had been accepted by both parties and sworn. Nor is there any merit in the contention that, because the State had accepted the juror McGhee, who had replied he had conscientious scruples, that, therefore, the State waived that question as to McSwain.
31 This did not take away from the State the right to challenge McSwain for that reason.

The theory of the State was that deceased and defendant were rivals for the attention and carnal favors of the negro woman, Ida McGrew; and that appellant shot deceased, Spell, on account of jealousy growing out of this relation. In this connection, the State asked this witness, Ida McGrew, the question: "If the defendant ever tried to induce her to leave the house in which she was then living, and for which deceased was paying rent, and if he made any threats against her in the event she failed to do so?" Exception was reserved, because of its irrelevancy, and because it would serve to inflame the minds of the jury and prejudice them against him. This being overruled, witness answered, that defendant did try to get her to leave said house, stating if she did not leave it, he would

burn up everything she had. This was not error. The evidence shows that appellant and deceased had been keeping the woman Ida McGrew. She seems to have been alternating between them to some extent, and the deceased had finally obtained the better of the race in the rivalry. This seemed to have very greatly enraged appellant. Deceased, by the answer of the witness, is shown to have been paying the rent on the house in which she was living. This was a circumstance that was introduceable bearing upon the question of the feelings of appellant towards the deceased, and tended to show the motive for the homicide.

Omitting the dying declaration of deceased, this was a case of circumstantial evidence. Several letters written by appellant to the negro woman were introduced in evidence. Various objections were urged to this testimony. We think the letters were admissible, for the same reason that was the testimony just mentioned. They were of a love-sick nature, and showed intimate relations had existed between appellant and the woman, and also referred to de-
32 ceased, in two or three of them, in terms more or less threatening. For instance, the first introduced is dated,

"BRYAN, TEXAS, *Sept. 26th*, 1904.

IDA: Henry Spell, the cowardly puppy, have got them notes I wrote you, taking them around showing them. A man that is that low-down is sorrier than the worst negro in town. Now you give the pup this note. I want him to see it. He can't face a white man; he is so sorry.

MC."

Another letter, dated June 29th, had this reference to deceased: "I want to talk with you, and I want you to let me out or Henry Spell one, for I want to see you every night myself, and I don't want to come without you telling me. You need not be afraid of him. He knows better than to harm you." In another letter he says: "Ida: Now, if you will turn that fool loose, I will give you more than he makes. He ain't worth a damn, and I will fix you up. I said a heap to you, but it was because I loved you so hard." It is not necessary to repeat the contents of the letters, and the above letter and extracts are copied simply to show that deceased was connected in the mind of appellant with the woman, and of the enmity engendered by reason of the relations existing between the parties. These were clearly introduceable to show the state of appellant's mind towards the deceased, and as bearing upon the motive that he may have had to perpetrate the homicide.

Cam Jones, testified for appellant, and was asked: "If deceased, Henry Spell, had ever sent any message by him to Zack Franklin, in regard to the woman, Ida McGrew." The evidence had shown that deceased was killed while at the house of Ida McGrew, and that the woman was the paramour of both deceased and defendant. The state's theory is that defendant and deceased, were rivals for her affections and carnal favors. The bill shows that the State objected to the question asked of the witness, because it was immaterial and

irrelevant. Objection being sustained, it is stated the witness would have answered, had he been permitted, that deceased had
33 told him to tell said Franklin that if he, Franklin, did not cease his visits to Ida McGrew, he (Spell) would kill him, and that this was shortly prior to the homicide. The purpose stated was to show that other parties than appellant were in the habit of visiting at the house of Ida McGrew, and that other parties than appellant had a motive for killing deceased. Sometimes this character of evidence becomes material and admissible. Such has been the rule since Dubose *v.* State, 10 Tex. Cr. App. The rule in regard to this may be thus stated, that investigations with reference to other parties than the accused could not be permitted, unless the inculpatory facts are such as proximately connect the party not on trial with the transaction. In other words, if a party other than the accused had the motive and opportunity, and was placed in such proximity to the homicide as to show he may have been the guilty party, the evidence may have been introducible. But remote acts and threats would not be, unless other facts in closer proximity and pertinently connecting the third party with the homicide at the time of the commission of the offense was shown. The mere fact that deceased may have had animus is not sufficient. The mere fact that deceased had threatened to kill other parties is not sufficient to admit it, unless there are other facts to show that the third party may have been placed in such position that he may have committed the homicide. This bill does not bring it within the rule.

The dying declarations of deceased were admitted. It is contended that the predicate is not sufficient. Cole Spell (brother of deceased) directly after the shooting, went to where his brother was; had a short talk with him, went down in town and undertook to arrest defendant, who refused to be arrested by him, because he had no warrant. He returned to the bedside of his brother, and had
34 a conversation with him. Before this conversation, deceased asked that all the parties be sent out of the room. This was done. Deceased said to his brother: "I know I am not going to get well, and I want to tell you who did it." He was perfectly rational at the time. The witness Mitchell (justice of the peace) says, he arrived at the place where deceased was after being shot; that he went into the room, and deceased recognized him. He was suffering from a gun-shot wound in the back, which came out in front, near the nipple. He says he did not hear the doctors explain or tell deceased of the seriousness of the wound. His testimony shows that deceased was of sound mind. He would talk a little, and then would stop. This witness said he thought from the first that the wound was fatal. "I asked the doctors if there was any chance for recovery, and the doctor said there was little. I then said, I thought it was my duty to take a dying statement. I then asked Tom Spell (a brother of deceased) to ask deceased if he would make a statement. He came and informed me that his brother (Henry Spell) would make a statement to me. I then went into the room where he was lying on the bed. I then asked deceased if he realized he was in dying condition, and he replied, 'I do.' I then

said, 'In all probability would not recover,' and he said, 'I do.' I then asked him, if he knew who shot him. This was about 9 o'clock." Nagle, county attorney, reached deceased after Mitchell took the statement. "I did not know what formality Mitchell had gone through in taking the dying declaration. I went in the room where deceased was lying, and asked 'How are you.' And the doctor asked him if he knew me, and he said, It is Mr. Nagle." I said, "Henry, do you think you are going to *do?*' And he said, 'I have not given up all hope,' and said, 'I don't see why I should not recover.' I had spoken to him several times as to his condition, so as to lay a predicate for his dying declaration, and each time he did not indicate he had given up hope. The last statement of
35 Dr. Emory was, 'Henry you are in a mighty bad condition, and you may perhaps die.' At that time, he said 'I know it.' I was never satisfied with his condition. It was about 9 o'clock when I started to the Moseley place, where Spell was. It must have been 9:30, when he made his first statement to me. Dr. Emory testified, "Up to the time Mitchell took the dying statement or declaration of deceased, I had not indicated to him that he was seriously wounded and would probably die. At the time C. M. Spell (brother of deceased) took a statement or declaration from the deceased, I had not indicated to him that he was not seriously hurt. At the time that Mr. Nagle talked to deceased, I had told him of the serious nature of his wound, and that in all probability he would not get well."

This is the testimony pro and con in regard to the predicate. Thereupon Cole Spell (brother of deceased) was permitted to testify, that deceased said to him, that he and Ida McGrew were out in the alley, and were facing the Moseley place, when he heard a noise at the gate, looked over his shoulder, and a pistol fired, and he recognized defendant." Under the state's evidence, from Mitchell and Spell (brother of deceased) there was a sufficient predicate laid for the introduction of the dying statement. The attack made on the predicate, through the witness Nagle, would have, perhaps, excluded it, had that been the only testimony in regard to the predicate. The court submitted this question to the jury, under appropriate instructions. We believe there was no error in this matter. The jury had the right to pass on the question, and the instructions were appropriate. Sims *v.* State, 36 Tex. Cr. 256; Martinez *v.* State, 56 S. W. 58; Highsmith *v.* State, 41 Tex. Cr. 32. If the testimony of Spell (brother of deceased) and Mitchell was believed by the jury, then a proper predicate was laid.

Appellant offered to prove by another witness, the following: "I asked deceased how he knew who shot him? He stated repeatedly that he recognized him by the flash of the pistol." A bill is
36 reserved to the rejection of this testimony, and it shows that deceased and Ida McGrew had just left her little house in the yard, near the Moseley residence, and she had squatted down by deceased, who was standing up, and who had leaned towards her, and just at this juncture the pistol fired immediately behind deceased. The woman testified that the night was dark, and she did not see or recognize the person who fired the shot. The bill further

recites that the dying declaration of deceased was then admitted, to the effect, that as the pistol fired he looked over his shoulder, and saw and recognized defendant as the person who fired it, and that defendant was standing at or near the gate opening from Mrs. Kestler's into the alley. Defendant then proved by witnesses Buchanan and Barron, that they had recently made experiments in discharging pistols on a dark night, under conditions similar to those testified to by the state's witnesses as shown above, and that it was impossible to recognize the person firing by the flash of the pistol.' The State then proved by Moseley and his wife, that they were at home on the night of the homicide; heard the pistol shot; that there was a lighted lamp at the time on their table. That a few nights ago they had assisted at an experiment reproducing the situation, by placing a lighted lamp on their table, in the position of the lamp on the night of the homicide, and said light cast a beam to the gate from Mrs. Moseley's into the alley, and that they recognized a person standing at the gate." This was the gate where defendant is supposed to have stood when he fired the fatal shot. Defendant then offered Dr. Emory, who stated that we was called to see deceased, about 7 o'clock on the night of December 7, 1904, dressed his wound, and talked with him about the shooting, a short time after he had made a statement to his brother, Cole Spell. Defendant then offered the testimony, which was rejected on exception by the State. The bill is signed with this qualification: "That
37 this evidence was offered by defendant. Defendant's attorneys stated that they would object to the state's attorneys cross-examining witness on any other part of deceased's dying declaration." Where dying declarations are admissible in evidence, other statements of deceased contradictory of the dying statements are usually admissible; that is, if they tend to impeach or contradict or depreciate the value of the dying declaration. Felder *v.* State, 23 Tex. Cr. App.; Orange *v.* State, 11 Tex. Ct. Rep. 512. It will be noted in this connection, that the deceased did not make any statement as to how or by what sort of a light he recognized appellant. He simply stated that he looked over his shoulder and recognized him. We do not believe this testimony was admissible for the purpose of impeaching the dying declaration. The evidence shows that the light was shining from the window of Moseley's residence on the gate where appellant is supposed to have stood when he fired the shot. If deceased had stated that he recognized him by the light from the windaw, this testimony, perhaps, would have been admissible; but, as he did not, the excluded testimony served in no manner to impeach. It may be stated further that the testimony shows that deceased stated in that connection that he was almost close enough to have touched him with his hand at the time the pistol fired.

Witness Nalle having testified that he saw defendant on the night of the homicide, and near the time it occurred, was asked whether or not defendant appeared to be laboring under excitement or whether his manner and conduct was natural. The answer was that he appeared to be perfectly natural, that he noticed no evidence in

his conduct of any excitement whatever. On cross-examination, the State having repeated said statements of the witness, propounded to him the following question: "Now is it not a fact that the defendant is an old poker player, and not easily excited?" Exception was interposed by appellant, and it was sustained. Appellant reserved
38 a bill of exceptions to the asking of the question. There was no testimony before the jury on the question. There is no merit in this bill.

Another bill of exceptions is reserved to the action of the court refusing to set aside the verdict, because a juror, W. P. Burkhlater was not a fair and impartial juror, and filed in support of that, the affidavits of T. H. and George Royder, who depose and state that, on or about the 12th day of March, 1905, the juror mentioned, George Royder and J. P. Royder were talking and discussing the killing of Henry Spell, and the juror stated, that any man who would write such letters as William McCorquodale did, to a negro woman, ought to have his damn neck broken or be hung. This was before the juror was taken. Counsel for appellant state, that they nor neither of them had any reason to suppose that the juror was not a fair and impartial juror; that they nor neither of them knew or had reason to suspect that he was prejudiced against appellant, or that he had expressed the opinion set out in the affidavits of the Royders; and that the juror qualified on his *voir dire*, and that they did not know or learn of the conduct of the juror until after the trial of the case, nor of his prejudice against appellant, and that at the time he took the juror, appellant's challenges had not been exhausted, and if they had known the facts, they would have challenged him.

Burkhalter filed an affidavit to the effect, that he had no recollection of using any such language, either in form or import; but he could not say that he did not use the language, but if he did, it was an idle and unmeaning remark, and not seriously made; that he had not seen any of the letters referred to, and had not read or heard what they contained, and knew nothing of the facts in the case. That he had talked to none of the witnesses and had formed no opinion prior to the trial as to the guilt or innocence of the appellant, and was in no way biased or prejudiced, etc. All of the jurors
39 file affidavits in regard to the matter, and they show that Burkhalter was the only juror who was favorable to appellant in their retirement, and that he held out in his favor for sometime, until after a full discussion of the evidence, when he finally consented and agreed to the verdict rendered. Burkhalter himself testified that he was favorable to appellant and hung the jury on the question as to whether the dying declaration should be considered; that with that in the case, that appellant ought to be convicted, but he had doubt in his mind as to whether it should be considered by the jury. In this he is sustained by all of the jury. It is further in evidence by the sheriff, district clerk and another witness, that this juror was absent, and had not been served, but appellant's counsel insisted that he should be brought into court, and attachment was issued for him and he was brought into court and accepted as a juror. None of these parties show that while the juror was being examined,

was he interrogated as to whether or not he had formed any conclusion as to the guilt or innocence of the defendant, or that he had any bias in favor of or against him. The statement is simply, that the parties were not aware that he had so expressed himself. It is well settled by a long line of decisions in this state, that where a juror is accepted in this manner, it is too late after the trial to investigate this cause of challenge. If the bill of exceptions or the facts developed on the motion for new trial had shown that they had investigated this matter and he had misled counsel or the appellant in regard to it, we would have a different question presented. It is further shown by his affidavit that if he had expressed himself so at all, which he did not recollect, it was a careless and meaningless remark. In this condition of the record, we do not believe the court erred in overruling the motion for new trial.

It is contended that the charge on murder in the second degree is wrong. That portion of it is as follows: "If you believe
40 from the evidence beyond a reasonable doubt that the defendant upon his malice aforethought, with a deadly weapon or instrument reasonably calculated to and likely to produce death by the mode and manner of its use, in a sudden transport of passion, aroused without adequate cause, and not in defense of himself against an unlawful attack, reasonably producing a rational fear or expectation of death or serious bodily injury, with intent to kill, did shoot with a gun, and thereby kill Henry Spell, as charged in the indictment, you will find him guilty of murder in the second degree." The objections are, that it is a collection of abstract legal phraseology, inapplicable to the facts, finding no support in the evidence, and depriving him wholly of the benefit of an instruction on murder in the first degree; puts a greater burden upon him than the law authorizes, and requested the jury to find, before they could be authorized to convict of murder in the second degree, that defendant was in a sudden transport of passion, aroused without an adequate cause there being no evidence as to the condition of the defendant's mind, aroused by any sudden passion arising from any cause adequate or inadequate, and also required the jury to find that the killing was not in self-defense, there being no evidence of self-defense, etc. We are of opinion that the charge is favorable to appellant. In fact, we very seriously doubt if the evidence suggested the theory of murder in the second degree in the case. If appellant did the killing, it was upon former grudges, and for revenge on account of being supplanted in the affections of the negress, Ida McGrew. He went to the place where they were together at night, and shot deceased in the back. If he did the killing; and it was done on this account murder in the second degree would be excluded. If he found deceased with the woman, not expecting to meet him at that point, and he killed him because of that fact, with
the former grudges out of his mind as well as his antecedent
41 malice towards him, then it would have been upon a sudden impulse. Whether or not this peculiar expression, "sudden transport of passion" would be technically correct or incorrect we do not deem it necessary to discuss, but under this record, we do not

believe this could have possibly injured appellant, even if it was error. The court charged fully upon murder in the first degree, murder in the second degree, and then gave the reasonable doubt between the two degrees. There was no adequate cause in the record. Therefore, the question of manslaughter could not have been considered by the jury, from any stand point, and if there was any passion at all, it was from an inadequate cause; and if it was upon a sudden meeting, in view of all this record, to have charged the jury that it was upon a sudden transport of passion, would not be of sufficient moment, if wrong, to require a reversal. This is recognized by appellant's next exception to the charge, in which he contends that the court erred in not charging the jury that, if appellant went to the house of Ida McGrew, without any intention of killing the deceased, Henry Spell, and while there he saw deceased and the woman together, and from any cause not deemed adequate, killed to reduce the offense to manslaughter; or there was prejudice in the mind of defendant, a sudden transport of passion, anger, rage, or terror, rendering the mind incapable of cool reflection, and while in that condition of mind, he formed the intent to kill, and did shoot and kill Henry Spell, he would be guilty of murder in the second degree. While this charge is based upon a remote and rather speculative condition, in our opinion, it was sufficiently given in the charge complained of by appellant, just discussed. For, if murder in the second degree could be based upon any fact in this record, it would have been upon the fact that defendant came suddenly upon deceased with the woman. There was no possible contingency in this record that would have authorized a charge upon murder in the second degree, except that one
42 fact. We are of opinion that the charge as given in this respect is sufficient, and there was no error in not giving the charge of which appellant complains.

The court's charge is also criticised for failing to submit the issue of manslaughter. There is not a fact in the case calling for it.

Believing there is not sufficient error in the record authorizing a reversal, the judgment is affirmed.

DAVIDSON,
Presiding Judge.

(Delivered December 20th, 1905.)

Endorsed: No. 3499. 4th Assignment. Wm. McCorquodale, Appellant *vs.* The State of Texas, Appellee. Appeal from Brazos county. Affirmed. Opinion by Davidson, Pres. Judge. Filed in Court of Criminal Appeals, at Tyler, Texas, December 20th, 1905. E. B. Wiggins, Clerk.

Judgment of Affirmance, Dec. 20, 1905.

Original Judgment.

WEDNESDAY, *December 20th*, 1905.

No. 3499, 4th Assignment.

WM. MCCORQUODALE, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Brazos County.

Affirmed.

Opinion by DAVIDSON, *P. J.:*

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that this decision be certified below for observance.

43 *Order of Court Overruling Appellant's Motion for Rehearing.*

Be it remembered, at a term of the Honorable Court of Criminal Appeals of the State of Texas, begun and holden at Dallas, on the 1st day of January, A. D. 1906, and which adjourned on March 24th, 1906, (present Hon. W. L. Davidson, Presiding Judge, and Judges J. N. Henderson and M. M. Brooks) in the cause of

No. 3499,

WM. MCCORQUODALE, Appellant,
vs.
THE STATE OF TEXAS, Appellee,

Brazos County,

the following orders were made:

February 21st, 1906.—Submitted on appellant's motion for rehearing.

March 24th, 1906.—This cause came on to be heard on the appellant's motion for rehearing, and the same being considered by the court, is overruled.

I, J. M. Gaston, Clerk of the Court of Criminal Appeals of the State of Texas, at the city of Dallas, hereby certify that the foregoing is a true copy of the orders made by this Court in the above entitled and numbered cause.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court at Dallas, this the 28th day of March, A. D. 1906.

[SEAL.] J. M. GASTON, *Clerk.*

44 *State's Motion for Rehearing and to Transfer.*

Filed Mar. 31, 1906.

No. 3499, 4th Assignment.

WM. MCCORQUODALE, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Brazos County.

Now comes the State, by the Assistant Attorney General, and would show the court, that the judgment in this cause was affirmed at Tyler, and the appellant's motion for rehearing was overruled at the Dallas Term;

That since which time it has been discovered, and this court's attention is now called to the fact that the transcript does not contain a complete judgment against appellant, though the sentence is contained in the transcript:

Wherefore, the State prays that the court order the transcript and all papers transferred from Tyler to the Austin Branch of the Court, to the end that this court may determine its jurisdiction of this appeal, and whether or not the judgment should be reformed and affirmed, or whatever action this court deems necessary.

Respectfully submitted,

V. B. HUDSON,
Dist. Attorney.
HOWARD MARTIN,
Ass't Att'y Gen'l.

Endorsed: Motion for rehearing and to transfer transcript from Tyler to Austin. Filed in Court of Criminal Appeals at Dallas, March 31, 1906. J. M. Gaston, Clerk. Filed in Court of Criminal Appeals at Austin, Texas, April 2nd, 1906. E. P. Smith, Clerk. Filed in Court of Criminal Appeals at Tyler, Texas September 10, 1906. E. B. Wiggins, Clerk.

45 *Order of Court Transferring Transcript and All Papers from Tyler to Austin.*

Be it remembered at a Term of the Honorable Court of Criminal Appeals of the State of Texas, begun and holden at Austin, on the 2nd day of April, A. D. 1906 (present Hon. W. L. Davidson, Presiding Judge, and Judges J. N. Henderson and M. M. Brooks) in the cause of

No. Mo. 25/3499,

WM. MCCORQUODALE
vs.
THE STATE OF TEXAS, Appellee,

Brazos County,

the following orders were made:

"WEDNESDAY MORNING, *April 4th*, 1906.

This cause came on to be heard on the motion submitted by the State's attorney, asking that the transcript and all papers in this cause be transferred from Tyler to the Austin Branch, and the same being considered by the court is granted; and the clerk of this court at Tyler will forward all the papers to the clerk at this place. The clerk will furnish clerk at Tyler, with a certified copy of this order for his observance."

I, E. P. Smith, Clerk of the Court of Criminal Appeals of the State of Texas, at Austin, hereby certify that the foregoing is a true copy of the orders made by this Court in the above entitled and numbered cause.

In witness whereof, I hereunto set my hand and affix the Seal of said Court, at Austin, this 4th day of April, A. D. 1906.

[L. S.] E. P. SMITH, *Clerk.*

46 *Appellant's Exception and Answer to the State's Motion to Reform and Affirm.*

Filed May 9, 1906.

In the Court of Criminal Appeals of Texas, Austin Term, 1906.

No. 3499, 4th Assignment.

WM. MCCORQUODALE, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Brazos County.

To the Honorable the Judges of said Court:

Now comes the appellant, Wm. McCorquodale, by his counsel and files this his answer to the State's motion filed herein at Dallas on March 31st, and at Austin on April 2nd, 1906, and for answer appellant says:

1st. He moves to strike out the State's said motion because same was not disposed of at the term at which it was filed, and at which the rehearing in this case was decided, the case having been affirmed on the 20th day of December, 1905, at the Tyler Term, and rehearing having been overruled on the 24th day of March, 1906, at the Dallas Term, 1906, of this Honorable Court, and of this he prays judgment of the court.

2nd. He moves to strike out the State's said motion because it is not such a motion as is contemplated by law, in this, that it is not a motion for a rehearing, and not a motion for this Court to correct or reform its own judgment, but a motion to this Honorable Court to render and enter an original judgment which the lower court alone had power to do at the proper time, and of this he prays judgment of the court.

3rd. He moves to strike out the State's said motion because it asks this Court to now determine its jurisdiction of this appeal, "and whether or not the judgment should be reformed and affirmed," thereby, in effect, asking this court to enter, or render a judg-
47 ment to supply the omission of such judgment in the court below, which it is beyond the authority of this Court to do, and therefore same should be stricken out, and of this he prays judgment of the Court.

4th. If required, then for answer to the first feature of said motion, to-wit: "jurisdiction," appellant answers:

That this court had, and properly entertained, jurisdiction of this cause, and its judgment of affirmance and overruling appellant's motion for a rehearing was a proper exercise of jurisdiction; the jurisdiction of this court having attached under the statute upon the perfecting of the appeal in the Court below, and its jurisdiction not having been questioned by the State, or appellant, to

render the identical judgment it did render, and, unless somethi
should intervene to prevent it, there is no reason why the juc
ment as rendered by this Court should not be carried into executi
and therefore said motion should be denied, and of this appella
prays judgment of the Court.

Authorities.

Art. 884 Code of Crim. Proc.
Estes *v.* State, 38 Tex. Crim. Rep. 506;
Lewis *v.* State, 34 Tex. Crim. Rep. 126;
Quarles *v.* State, 37 Tex. Crim. Rep. 362.

5th. And if answer be required, then for answer to the seco
feature of said motion, to-wit: "and whether or not the judgme
should be reformed and affirmed," appellant says, that said moti
is vague and indefinite as to what this Court is asked for in s
connection, in that it does not state whether the judgment of t
Court or the judgment of the Court below should be reformed a
affirmed, and does not point out in what respect the judgment
the Court below should be reformed, or if it contemplates the juc
ment of this Court, it does not point out in what respect, or partic
lars, the judgment of this Court should be reformed, and, as to t
judgment of the court below, this Court is without authority
render or supply an original judgment, or any of the ess
48 tials thereof, which were omitted in the Court below, b
could only "reform" or "correct" judgments in the Co
below which, though final and full were erroneous in the assessme
of the penalty or in the name of the offense for which the accus
was convicted, or some similar defect, and therefore the State's s
motion should be denied, and of this he prays judgment of t
Court.

Authorities.

Longora *et al v.* State, 44 S. W. 1089.
Quarles *v.* State, 50 S. W. 457.
Kingsbury *v.* State, 39 S. W. 365.
Jones *v.* State, 55 S. W. 559.
Estes *v.* State, 38 Tex. Crim. Rep. 506.

"Sentence follows the judgment and cannot be properly p
nounced until after the judgment has been rendered."
Mapes *v.* State, 13 Tex. App. 85.
And authorities cited under the preceding ground of t
Motion.

6th. And appellant further answering says, that this Court
without authority to grant any relief under the Motion filed by t
State, because same is not a motion for rehearing, and the fifte
days within which the State could have filed a motion for rehear

have passed and this Court is now, by reason thereof, divested of jurisdiction to make any other or further order in this case than to order the issuance of the Mandate to the Court below, for observance, or to correct some error in its own judgment, and there being nothing pointed out to correct: and therefore the State's said motion should be denied, and of this appellant prays judgment of the Court.

7th. Appellant further answering says, that the only order this Court can now make is to deny the State's said motion, and the only order it could have made regarding the judgment of the court below had said matter been called to the court's attention in a proper way, and at the proper time, would have been to dismiss the appeal, but the State having stood by and permitted this Court to affirm the case (the court having jurisdiction under art. 884
49 of the statute) and to further exercise and entertain jurisdiction and deny a rehearing, the jurisdiction of this Court being lawful in the first instance, and being exercised in a lawful manner, and no objection having been made by the State, any want of jurisdiction of this Court to affirm the judgment that was rendered in the Court below has been waived by the State, and the State having failed to ask for a rehearing after appellant's motion for a rehearing was overruled, within the fifteen days allowed by statute, this Court is now without authority to make any order respecting this case, other than to dismiss and overrule the State's said motion, and to order the issuance of the mandate, and therefore the State's said motion should be denied, and of this he prays judgment of the Court.

8th. And further answering: this appellant says, that this court has no authority to enter an original judgment or to supply the want of a judgment in the Court below at any time, and could not have done so had the State filed a proper motion for that purpose before this Court at the proper time, and therefore this Court is without authority to grant the relief asked for in said motion, and same should be denied and of this appellant prays judgment of the Court.

Wherefore, appellant prays, that the State's said motion be denied, in so far as same seeks to have a judgment entered or supplied by this Court; to supply the want of a proper judgment in the Court below, and in so far as it seeks to have this Court make any other order other than to order the issuance of the mandate, in accordance with the opinion heretofore rendered by this Honorable Court: of all of which he prays judgment of the Court.

BROCKMAN & KAHN,
A. G. BOARD,
T. S. HENDERSON, AND
DOREMUS & BUTLER,
Counsel for Appellant.

50 Endorsed: No. 3499. Wm. McCorquodale, Appellant *v.* State of Texas, Appellee. Appellant's Exception and Answer to the State's Motion to Reform and Affirmed. Filed in Court of Criminal Appeals, at Austin, Texas, May 9th, 1906. E. P. Smith, Clerk. Filed in Court of Criminal Appeals, at Tyler, Texas, Sept. 10, 1906. E. B. Wiggins, Clerk.

Order Transferring Cause from Austin to Tyler.

Be it remembered, at a Term of the Honorable Court of Criminal Appeals of the State of Texas, begun and holden at Austin, on the 2nd day of April, A. D. 1906, (present Hon. W. L. Davidson, Presiding Judge, and Judges J. N. Henderson and M. M. Brooks) in the cause of

No. 3499.

WM. MCCORQUODALE
v.
THE STATE OF TEXAS, Appellee,

Brazos County,

the following orders were made:

June 29, 1906, taken under advisement and transferred to Tyler.

May 9, 1906. Submitted on State's motion to reform judgment.

I, E. P. Smith, Clerk of the Court of Criminal Appeals of the State of Texas, at Austin, hereby certify that the foregoing is a true and correct copy of the orders made by this Court in the above entitled and numbered cause.

In Witness Whereof, I hereunto set my hand and affix*ed* the seal of said Court, at Austin, this 2nd day of July, A. D. 1906.

[L. S.] E. P. SMITH, *Clerk.*

51 *Opinion of Court on State's Motion to Reform and Correct Judgment.*

Nov. 21, 1906.

No. 3499. 4th Assignment.

WM. MCCORQUODALE, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Brazos County.

This case was affirmed at the Tyler Term, 1905, motion for rehearing was filed, and the case was carried to the Dallas Term, 1906, where the motion was overruled. Subsequent to the overruling appellant's motion, the State filed a motion requesting this court to recall the transcript from the Tyler Branch, where it had been forwarded for the purpose of issuing the mandate, and to correct the judgment of the lower court.

This motion is in this form: "Now comes the State, by the Assistant Attorney General, and would show the court, that the judgment in this cause was affirmed at Tyler, and the appellant's motion

for rehearing was overruled at the Dallas Term; that since which time it has been discovered, and this court's attention is now called to the fact that the transcript does not contain a complete judgment against appellant, though the sentence is contained in the transcript. Wherefore the State prays that the Court order the transcript and all papers transferred from Tyler, to the Austin Branch of the court, to the end that this Court may determine its jurisdiction of this appeal, and whether or not the judgment should be reformed and affirmed, or whatever action this court deems necessary:"

On said motion the transcript was recalled and the mandate ordered to be withheld pending the determination of the State's motion.

It appears from the transcript, that the judgment of the district court is in the following form:

52 No. 4283:

"THE STATE OF TEXAS
vs.
WILLIAM MCCORQUODALE.

MARCH 27TH, 1905.

This day this cause was called for trial, and the State appeared by her district attorney, and the defendant, William McCorquodale, appeared in person, his counsel also being present, and the said defendant, William McCorquodale, having been duly arraigned, and both parties announced ready for trial, and the defendant, William McCorquodale, in open court pleaded not guilty to the charge contained in the indictment herein; thereupon a jury, to-wit: J. H. White and eleven others, were duly selected, empaneled and sworn, who, having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the court, retired in charge of the proper officer to consider of their verdict, and afterwards, on April 1st, were brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court, the following verdict:

'We, the jury, find the defendant guilty of murder in the first degree, and assess his punishment at confinement in the state penitentiary for life.

J. H. WHITE, *Foreman.*'"

The judgment is in the ordinary form, and is complete so far as it goes, except the 9th and 10th requirements under art. 831 C. C. P. are omitted. Sub. 9 provides: "In the case of a conviction, that it is considered by the Court that the defendant is adjudged to be guilty of the offense as found by the jury; or, in case of acquittal, that the defendant be discharged.

10. That the defendant be punished as has been determined by the jury in cases where they have the right to determine the amount

or the duration and the place of punishment, in accordance
53 with the nature and terms of the punishment prescribed in the verdict."

The object of the motion on the part of the State it will be seen is, to have this Court reform and correct the judgment.

Appellant contests this on two grounds: First, that this court has lost jurisdiction of the case:—the motion for rehearing on the part of the defendant having been overruled, and the State's motion not being in the nature of a motion for rehearing. Second, that it is not competent, even if this court had jurisdiction of the case, to reform and correct the judgment of the lower court in the respects pointed out.

With respect to the first proposition, we hold, that this court has plenary power over its judgments during the term, and even after the term, and although a motion for rehearing may have been overruled, in order to support its jurisdiction, and to ascertain such matters of fact as may be necessary in order to exercise its jurisdiction. Bailey *v.* State, 11 Tex. Cr. App. 140; Craddock *v.* State, 15 Tex. Cr. App. 641.

In Bailey's case, *supra*, motion for rehearing was filed after the expiration of the fifteen days allowed by law (Art. 1030 Rev. Stat.) for the filing of such motions. The Court there, in passing on the question, say: "The powers of this Court are not so restricted as to prevent the court from correcting clerical errors, mistakes or defects of form, or making additions of matters which may be necessary to carry out the judgment of the court. Nor does the statute place such a restraint upon the powers of this court as to prevent the court from declaring null and void the judgment rendered in a case not legally before this court." In support of this proposition, the Court cites Burr *v.* Lewis, 6 Texas, 76.

In Craddock's case, *supra*, some misdemeanor cases had
54 been dismissed on the alleged ground that no sufficient recognizances had been filed in said cases. It there appeared that the records in said cases in the lower court had been lost or destroyed, and that the State, without notice to appellant, substituted some of said lost papers, and among others, substituted the recognizance, which substitutions showed they were defective recognizances. These substituted recognizances were brought to this court, and the appeals dismissed thereon. Subsequently, on the affidavit of appellant, the matter of the substitution of these recognizances was brought to the court's attention, and that the same were substituted without notice; and it was further shown that the recognizances really executed in said cases were proper and legal recognizances; and that the attempted substitution was a fraud upon the rights of appellant. The Court, Judge Winkler rendering the opinion, makes reference to the powers of this court to ascertain and maintain its jurisdiction by affidavit or otherwise, as provided by art. V, sec. 6 of the Constitution. The court there also refers to Burr *v.* Lewis, and Chambers *v.* Hodges, 3 Texas, 517. The court quotes approvingly from the latter case, as follows: "The principle that the application for the rehearing upon the merits cannot be heard after the

term, does not apply where the judgment is sought to be set aside, as in this case, upon the ground that the judgment was not a legal judgment, when rendered, for want of jurisdiction. If the judgment when rendered was void, it could not conclude the right of any party. But if the case was not legally before us at the last term, when the judgment was rendered, it is immaterial at what term the application was made, for if the judgment was a nullity, it may be so declared upon a motion made at a subsequent term." The court in that case, though after the term, entertained jurisdiction and recalled the mandates and authorized the cases to be set down at the next ensuing term.

55 From these cases it will be seen that this court has heretofore fully recognized its power to inquire into and maintain its jurisdiction, and will take all proper steps to determine and enforce that jurisdiction. We apprehend, if this was an omission of something in the judgment, as the wrong number of years which may have been adjudicated against defendant, to his injury, there could be no question but that the court would entertain the jurisdiction to recall the mandate, and either correct the judgment here, or if it was found that this could not be done, to send the case before the proper tribunal, for the proper entry or correction. We do not believe that there can be any question as to the authority of this court, under the circumstances shown in this case, to entertain the state's motion, and order the clerk to withhold the issuance of the mandate and return all of the papers, and have the same re-entered on the docket, for such proceedings as may be proper.

The second proposition relates to the power of this Court to correct and reform the judgment, by adding thereto, the omitted clauses. It appears to be conceded by the appellant, that the lower court, might correct and reform this judgment, by adding thereto the omitted clauses, but that this court has no power to do so; that all it can do is, to reverse and remand the case, because there is no final judgment in the case, and that the lower court might reform and correct the same, after it had been so remanded. That is, we understand it to be agreed, under the authorities, that if there had been an attempt on the part of the clerk below to insert the omitted clauses in the judgment, but these had been erroneously inserted, as to the offense, or as to the number of years appellant was to be confined, that this court might correct the same under art. 904 C. C. P., which among other things, authorizes this court to "reform and correct the judgment, as the law and the nature of the

56 case may require." The contention being that "reform and correct" appertains to something erroneously done, but does not refer to an entire omission to do a thing. Small *v.* State, 38 S. W. 798; Bullard *v.* State, 50 S. W. 348; Burks *v.* State, 55 S. W. 824; Turner *v.* State, 44 Tex. Cr. 69.

We do not agree to this narrow construction of said article. In Small's case, *supra*, the question of the amendment of the sentence under said article was before this Court, and it was there held by a majority of the Court (Judge Davidson, dissenting) that the sentence of the prisoner in a felony case was more than a mere formal

matter; that appellant was required to be present, and the sentence authorized by law passed on him; and that it would not be presumed that the record, being the final judgment of the court, spoke an untruth; and that the case should be reversed, in order that the prisoner might be resentenced, for the offense of which he had been convicted. Reaching the conclusion it did, the case of Peterson *v.* State, 25 Tex. Cr. App. 70 and Stray *v.* State, 28 S. W. 811, were in effect overruled. This case appears to have been followed by Barfield *v.* State, 41 S. W. 610; Womble *v.* State, 43 S. W. 114; Longoria *v.* State, 44 S. W. 1089.

In Longoria's case, the exact question presented here was before the Court. The power to reform in said case does not appear to have been called to the attention of the Court. The case was simply dismissed, because it did not contain a final judgment.

In Bullard's case, *supra*, appellant was convicted of the theft of a horse, and his punishment assessed at seven years in the penitentiary: the judgment was entered accordingly. In the sentence (which was embraced in the record and sent to this court) his term of punishment was made to begin at the termination of the judgment and sentence in another case against him. It appeared to this Court that there was no testimony authorizing the cumula-
57 tion of his sentence based on another conviction. Under the authority of art. 904, the judgment of the lower court was corrected and his sentence made to commence at once. That case was differentiated from Small *v.* State, *supra*.

In Burk's case, 55 S. W. 824, appellant was indicted for passing as true a forged instrument in writing. The verdict of the jury found appellant guilty as charged in the indictment and assessed his punishment at confinement in the penitentiary for a term of two years. The judgment of the court contained the following recital: "It is therefore, considered and adjudged by the Court that the defendant, Ben Burks, is guilty of the offense of forgery as found by the jury, and that he be punished as has been determined by the jury by confinement in the penitentiary for a term of two years." Here, inasmuch as the indictment charged appellant with uttering a forged instrument, he could not be convicted of forgery, and the judgment finding him guilty of that offense was reformed and corrected so as to make it correspond with the indictment; that is, he was adjudged guilty of uttering a forged instrument. This was on the ground that it was a clerical mistake, and that there was enough in the record to make the correction. From that decision the writer dissented, holding with the Small case, *supra*.

In Turner's case, *supra*, the question again came before this Court on motion for rehearing. It was there held (all of the judges present and concurring) that the judgment could be reformed in accordance with the holding of this court in Burks and Bullard cases, *supra*. It will be seen from these latter cases that the former views of this court, as announced in Smalls case, and those following it, have been overruled, and this court has returned to the former rule on the subject. McDonald *v.* State, 14 Tex. Cr. 505; Reyna *v.* State, 26 Tex. Cr. 666; O'Bryan *v.* State, 27 Tex. Cr. 339.

However, the contention is, that none of our decisions go
58 to the extent, under the authority of this court, to reform and correct the judgment,—to enter some omitted clauses as are left off from this judgment. Indeed, it is said that Longoria *v.* State, is direct authority against this view. Longoria's case followed Small's case, and was rendered before the overruling of that line of cases. While the decision is exactly in point, the question of the power of the court to reform and correct the judgment was not brought before the court.

It will be seen from an inspection of the record, that the sentence of the lower court, which is the final act or judgment of the Court, is in proper form. Art. 832 C. C. P., and authorities cited thereunder in White's Ann. C. C. P. This, as has been held, is the final judgment without which an appeal will not be entertained.

It will be readily conceded that the lower court, under art. 837 C. C. P. could complete the entry of this judgment. But it is insisted that this Court is powerless to make the correction, and the case should be sent back in order that it be corrected in the court below. We have exactly the same data here for the correction of said judgment that the court *a quo* would have, were it sent there. It occurs to us, that the language used in our statute, "reform and correct" has more force than if the statute contained the power merely to "correct." Evidently the legislature used the word "reform" in addition to that of "correct" for some purpose, and it has a larger signification. "Reform" means to correct; to make anew; to rectify. Rapalje Law Dic. p. 1083. Here, we have all of the foundation of the judgment, including the verdict of the jury, which is the basic rock on which the judgment is formulated. We have following this, the final judgment of the court, which is the sentence. This itself adjudicates the guilt of appellant and sentences him, in accordance with the verdict and judgment. From this data,
certainly we can do that which the court *a quo*, in due order,
59 should have done. We accordingly hold, that the judgment of the court below should be reformed, and corrected, so as to make it read, in connection with the judgment as entered, and following the verdict, as follows, to-wit:

"It is therefore considered, ordered and adjudged by the Court that the defendant, William McCorquodale, is guilty of the offense of murder in the first degree, as found by the jury, and that he, the said William McCorquodale, be punished as has been determined by the jury by imprisonment for life in the penitentiary; and it is further ordered, adjudged and decreed by the court that the State of Texas do have and recover of and from the defendant, William McCorquodale, all costs of this prosecution, for which execution may issue; and that the said defendant is now remanded to jail to remain in custody to await the further order of the court."

The State's motion to reform is accoringly granted; the judgment is reformed and corrected, as above indicated, and as reformed and corrected, the judgment is affirmed in accordance with the previous opinion of this court.

HENDERSON, *Judge*.

Davidson, P. J. dissenting.

Endorsed: No. 3499. 4th Assignment. Wm. McCorquodale, Appellant *vs.* The State of Texas, Appellee. Appeal from Brazos County. State's Motion to Reform Granted: Judgment is Reformed and Corrected, and as Reformed is Affirmed. Opinion by Henderson, Judge. Davidson, P. J. Dissents. Filed in Court of Criminal Appeals, at Tyler, Texas. November 21, 1906. E. B. Wiggins, Clerk.

60 *Dissenting Opinion of Davidson, Pres. Judge.*

No. 3499, 5th Assignment.

WM. MCCORQUODALE, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Brazos County.

I respectfully enter my dissent from the conclusion of my Brethren in regard to reforming and correcting the judgment of the trial court. The record discloses that there is not a final judgment, and the transcript of the judgment closes with entering the verdict of the jury. This matter was overlooked in the disposition of the case, both upon the original hearing and on motion for rehearing, and was called to our attention subsequently by a motion on the part of the State to reform and correct the judgment.

By virtue of the terms of art. 904 C. C. P. this Court could reform and correct judgments, and such has been the law in Texas since the adoption of the original Penal Code and Code of Criminal Procedure. Our decisions are numerous to the effect that this Court may under, proper condition of the record, reform and correct the judgment. But I am not aware of any case decided by this court; or the supreme court, before the creation of the Court of Appeals, under the Constitution of 1876, that ever undertook or held that the appellate court had authority to make or enter a final judgment on appeal. It is the unvaried holding that art. 904 only applies and can be called into practice when there has been a complete judgment entered in the trial court, but one which is not in accord with the verdict of the jury. In the case in hand there was no final judgment entered, and therefore there was nothing to reform or correct.

Art. 831 C. C. P. provides: "(7) The return of the verdict. (8) The verdict. (9). In case of a conviction that it is con-
61 sidered by the court that the defendant is adjudged to be guilty of the offense as found by the jury, but in case of an acquittal that the defendant be discharged. (10.) That the defendant be punished as has been determined by the jury in case where they have the right to determine the amount or the duration and place of punishment in accordance with the nature and terms of the punishment prescribed in the verdict."

Subdivisions 9 and 10, above quoted, are not incorporated in the record, and were not entered in the judgment in the trial court; nor does the transcript contain such in the final judgment. It has been determined that the right of appeal exists only after the judgment of final conviction has been rendered and entered against defendant, and that there is no appeal until a judgment has been rendered and entered adjudging defendant guilty of an offense. Washington *v.* State, 31 Tex. Cr. 84; Darnell *v.* State, 24 Tex. Cr. 6; Pate *v.* State, 21 Tex. Cr. 191. The judgment of conviction rendered may be conceded to consist of two parts; first, the facts judicially ascertained, together with the manner of ascertaining them entered of record. Second, the recorded declaration of the court pronouncing the legal consequences of the facts thus judicially ascertained. Both of these are necessary in the rendition of a judgment of conviction. Mayfield *v.* State, 40 Texas 289; Pennington *v.* State, 11 Tex. Cr. App. 281. The requisites prescribed by art. 831 of the final judgment in a felony case must be complied with, in order to constitute a final judgment. Morales *v.* State, 13 Tex. Cr. App. 346; Labaite *v.* State, 4 Tex. Cr. App. 169; Butler *v.* State, 1 Tex. Cr. App. 638; Roberts *v.* State, 3 App. 47; Young *v.* State 1 App. 64; Calvin *v.* State, 23 Texas 577; Burrell *v.* State, 16 Texas 147; Shults *v.* State, 13 Texas 401. With reference to subdivision 9 of said art. 831, the judgment must show that it is considered by the court, that the defendant is ad-
62 judged to be guilty of the offense as found by the jury. But in case of an acquittal he should be discharged. Keller *v.* State, 4 Tex. Cr. App. 527; Morales *v.* State, 13 Tex. Cr. 346; Gaither *v.* State, 21 Tex. Cr. 527; Reyna *v.* State, 26 Tex. Cr. 666; Longoria *v.* State, 44 S. W. 1089. Subdivision 10 of the same article requires that the final judgment from which an appeal can be prosecuted must show that the accused was condemned to be punished as determined by the jury, setting forth the amount of the punishment, etc., as found in the verdict. Anschicks *v.* State, 43 Texas 587; Longoria *v.* State, 44 S. W. 1089; Coate *v.* State, 2 Tex. Cr. 302.

There is an unbroken line of authority in this State, holding that the appellate court cannot acquire jurisdiction on appeal of a criminal case, unless final judgment has been rendered in the court below. This was the settled law before the Penal Code and Code of Criminal Procedure were approved originally. And of course it has been the law since by express enactment of the statute. Longoria *v.* State, 44 S. W. 1089; Darnell *v.* State, 24 Tex. Cr. App. 6; Morales *v.* State, 13 Tex. Cr. 346; Pennington *v.* State, 11 Tex. Cr. 281; Labaite *v.* State, 4 Tex. Cr. 169; Roberts *v.* State, 3 Tex. Cr. 47; Butler *v.* State, 2 Tex. Cr. 529; Trimble *v.* State, 2 Tex. Cr. 303; Choate *v.* State, 2 Tex. Cr. 302; Butler *v.* State, 1 Tex. Cr. 638; Smith *v.* State, 1 Tex. Cr. 516; Smith *v.* State, 1 Tex. Cr. 408; Young *v.* State, 1 Tex. Cr. 64; Anschicks *v.* State, 43 Tex. 587; Mayfield *v.* State, 40 Tex. 289; Nathan *v.* State, 28 Tex. 326; Calvin v. State, 23 Tex. 377; Burrell *v.* State, 16 Tex. 147; Shannon *v.* State, 7 Tex. 492; Republic *v.* Laughlin, Dallam 412; Nash *v.* Republic, Dallam 631. And for other authorities see White's Ann. Code Crim. Proc. sec. 43.

This court has always recognized the proposition as correct that, until the final judgment as provided in art. 831, has been
63 entered in the trial court, the jurisdiction of this Court cannot attach; and invariably, until this case, all such appeals have been dismissed for want of a final judgment. The practice of this court in its construction of art. 904, C. C. P. has been equally certain that this court has the power to reform and correct the judgment and sentence, when the judgment has been entered and sentence pronounced in the trial court. There has been some fluctuation in regard to how far the court would go in reforming such judgment and sentence, but there is not, among all the cases, under either art. 831 or 904, *supra*, a decision rendered until this, where this court has supplied a final judgment under art. 831, or a sentence under 904. It has been the universal practice to dismiss the appeal from this court when art. 831 has not been complied with. So far as the judgment is concerned, as found in the transcript of this record, and as cited directly in point here, are Young *v.* State, 1 Tex. Cr. App. 64; Choate *v.* State, 2 Tex. Cr. App. 302; Trimble *v.* State, 2 Tex. Cr. App. 303; Longoria *v.* State, 44 S. W. 1089, and other cases cited, *supra*. The judgments in those cases were practically as in this case.

I might readily concur with my Brethren, if art. 831 had been complied with and the final judgment entered in the trial court, and the sentence had followed, so that the jurisdiction of this court had attached, that this court might reform and correct the judgment, however erroneously entered; to conform to the verdict rendered by the jury. This is as far as this court has ever gone in reforming and correcting judgments. This case, however, is different, and in which authority is assumed to render a final judgment that the trial court did not.

That the position I have assumed is correct, I think the terms of art. 837 C. C. P. demonstrates, for it is there provided, "Where from any ca-se whatever there is a failure to enter judgment and pronounce sentence upon conviction, during the term,—the judgment
64 may be entered and the sentence pronounced at any succeeding term of the court, unless a new trial has been granted, or the judgment arrested or an appeal has been taken." Following this, this Court has universally dismissed the appeal for want of a final judgment, where any of the requisites provided by art. 831 have been omitted, so that the trial court could enter its judgment at a subsequent term of court. If this court could enter a final judgment, omitted by the trial court, then art. 837 would be unnecessary and more than useless. This article, taken in connection with arts. 831, 834 and 904, it occurs to me, demonstrates the error into which my Brethren have fallen. Following this unbroken line of decisions and the articles of the Code of Criminal Procedure, I am clearly convinced that the jurisdiction of this court had not attached, for want of a final judgment. Therefore, there was no authority invested in this court to reform and correct the judgment. To re-state: before this Court can reform or correct a judgment, its jurisdiction must attach. A final judgment under art. 831 is a

prerequisite to the attaching of the jurisdiction of this court. I therefore respectfully dissent, and believe that this appeal should be dismissed, in order that the court below may enter its final judgment. I further believe that this court has no authority to enter a final judgment, under art. 831, inasmuch as its jurisdiction had not attached to this appeal.

DAVIDSON,
Presiding Judge.

Endorsed: No. 3499. 4th Assignment. Wm. McCorquodale, Appellant, *v.* The State of Texas, Appellee. Appeal from Brazos county. Dissenting Opinion by Davidson, Pres. Judge. Filed in Court of Criminal Appeals at Tyler, Texas, December 19, 1906. E. B. Wiggins, Clerk.

65 *Judgment Reforming and Affirming Judgment of Lower Court.*

Judgment of Court of Criminal Appeals Reforming and Affirming Judgment of Lower Court.

WEDNESDAY, *November* 21, 1906.

No. 3499, 4th Assignment.

WILLIAM MCCORQUODALE
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Brazos County.

State's Motion to Reform granted. Judgment is Reformed and corrected, and as reformed is affirmed.
Opinion by Henderson, J. Davidson, P. J. dissents.

This cause coming on to be heard on the State's motion for rehearing, and to reform and correct the judgment of the lower court as appears in the transcript on file in this Court, and the same being considered by the Court, and it appearing to the Court that said motion is well taken, it is granted. And it appearing to this Court that the judgment of the lower Court appearing in the transcript should be corrected and reformed, it is ordered, adjudged and decreed by this Court that the judgment be reformed and corrected so as to read, as follows, to-wit:

"MARCH 27, 1905.

No. 4283.

THE STATE OF TEXAS
vs.
WILLIAM MCCORQUODALE.

"This day this cause was called for trial, and the State appeared by her District Attorney, and the defendant William McCorquodale appeared in person, his counsel also being present, and the said defendant, William McCorquodale, had been duly arraigned, and both parties announced ready for trial, and the defendant, William McCorquodale, in open Court plead not guilty to the charge contained in the indictment herein; thereupon a jury, to-wit: J. H. White, and eleven others, were duly selected empaneled and sworn, who having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge
66 of the proper officer to consider of their verdict, and afterwards on April 1st, were brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open Court, the following verdict:

"We the jury find the defendant guilty of murder in the first degree and assess his punishment at confinement in the state penitentiary for life.

J. H. WHITE, *Foreman.*"

It is therefore considered, ordered and adjudged by the Court that the defendant, William McCorquodale, is guilty of the offense of murder in the first degree, as found by the jury, and that he, the said William McCorquodale, be punished as has been determined by the jury by imprisonment for life in the penitentiary; and it is further ordered, adjudged and decreed by the Court that the State of Texas do have and recover of and from the defendant, William McCorquodale, all costs of this prosecution, for which execution may issue; and that the said defendant is now remanded to jail to remain in custody to await the further order of the Court."

And this cause now coming on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court, that the judgment as reformed be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

67 *Appellant's Motion for Rehearing Upon Judgment Reforming and Affirming, Dec.* 4, 1906.

Appellant's Motion for Rehearing upon Judgment Reforming and and Affirming Cause.

No. 3499, 4th Assignment.

WM. MCCORQUODALE, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

To the Honorable the Judges of said Court:

Now comes the appellant, Wm. McCorquodale, and files this his motion for a rehearing upon the State's motion to "reform and affirm," and asks that the opinion of this Court rendered on the 21st of November, 1906, granting the State's said motion, and inserting in the original judgment the ninth and tenth subdivisions of the requirements of a judgment (as required by article 831, Code of Criminal Procedure) and asks that said judgment of this Court, inserting in said original judgment the said two subdivisions, and the affirmance of this cause upon such judgment rendered in this Court, be set aside and held for naught, and in this behalf appellant would respectfully show unto the Court:

First. That said action of this Court is erroneous and without authority of law or precedent.

Second. That the authority of this Court under article 904 Code of Criminal Procedure to "reform and correct a judgment as the law and the nature of the case may require," does not give this court the authority to enter in this court any essential element of a judgment not entered in the Court below, *and no equivalent thereof being entered in the court below;* and said Article refers to and is predicated upon, the pre-existence of some kind of compliance *constituting upon its face* a complete judgment in the court below.

Third. That said judgment of this Court is further erroneous, because, until a compliance with the various subdivisions of said article 831 of the Code of Criminal Procedure, which *upon its face,*
68 *prima facie, presents the entry of a complete judgment in the court below,* this court would be without jurisdiction to hear and determine the appeal, and the only order it could enter, if such defect as existed in the judgment of the court below in this case was called to this court's attention within the proper time and in a proper way, which was not done in this case, would be to dismiss the appeal, or reverse and remand the case to the court below for such action as that court might take under the law.

Fourth. That said judgment of this Court is further erroneous in this, that sentence must necessarily follow the judgment and cannot be properly pronounced until after at least a *prima facie* judgment, *good upon its face,* has been rendered and entered in the court be-

low, and the action of this court in adding to the attempted judgment in the court below subdivisions *nine* and *ten*, which are really the judgment of the court below, the preceding portions thereof being merely preliminary to those two said subdivisions, is, in effect, the rendition of a judgment by this court *after sentence has been passed*, and in the absence of appellant, and is without authority of law. (Mapes *v.* State, 13 App. 85. Longoria *v.* State, 44 S. W. 1089.)

Fifth. Said judgment of this Court is further erroneous, in this, that it, in effect, is the rendition of a judgment here, and dispenses with the rendition of a judgment in the Court below, because the judgment attempted to be rendered in the court below in this case, *adjudges nothing, and decrees nothing, and finds nothing*, and same is beyond the power of this court to do.

Sixth. Said opinion of this court is further erroneous in this, that it amounts to the rendition and entry of an *original judgment* in this court, and is subversive of the rights of appellant, because no judgment could be rendered in his absence, and no such al-
69 teration of, or additions to, the judgment, attempted to be rendered in the court below, *as amounts to the adjudging and decreeing*, as has been done in this case, can lawfully be done, because appellant was entitled to be present *when the adjudging and decreeing in his case took place*, and the rules and practice of this court does not contemplate such presence in this court, and therefore the entry of said essentials of a judgment here, to-wit: subdivisions 9 and 10 of art. 831, Code of Criminal Procedure was error.

Seventh. Said opinion of this Court is further erroneous in this, that, it assumes the power of this court to supply *original portions, or requisites*, of a judgment as defined and directed by article 831, Code of Criminal Procedure, where no *prima facie* judgment, *upon the face of the record* was rendered and entered in the court below, and is an assumption by this Court of the powers and duties of a *nisi prius* court, and is without sanction or authority of law.

Eighth. Said opinion of this Court is further erroneous in holding that the State's motion can be entertained by this Court, because the State filed no motion for rehearing, and more than fifteen days had elapsed after the rendition of the original judgment in this court, and the term at which said original judgment had been rendered had expired, and the term at which appellant's motion for rehearing had been decided had adjourned, before the State's said motion had been filed, and, under the weight of authority the State had lost its day, and this Court was without jurisdiction to entertain said motion.

Upon the foregoing ground we submit the following authorities, propositions and remarks, to-wit:

Upon the Court's authority to grant the relief asked for in the State's Motion, we submit the following authorities and observations:

(A.) This court is without authority to correct the judgment concerning the judgment of the court below, entered at a former term,

unless it had been brought to the attention of the court by
70 motion for rehearing, filed within fifteen days after the rendition of the judgment, which was rendered on December 20th, 1905.

Statement.—The original judgment was rendered in this case on December 20th, 1905, and appellant filed his motion for a rehearing within fifteen days from that date. The State filed no cross-motion for rehearing, and filed no motion of any character to the court, calling its attention to the matter complained of in the motion now before the Court.

Remarks.—Under the above state of facts, the term having expired at which the judgment was rendered, this court is without authority to now enter any order, except such orders as might be necessary to carry into effect its judgment; it cannot correct any defect in the judgment appealed from, even if it had authority so to do, at this time.

Authorities.

Drake *v.* State, 29 Tex. Cr. App. 275, on rehearing.
Garner *v.* State, 36 Texas 694.
Powers *v.* Com. (Ky.) 71 S. W. 494.

And also the following authorities:

"The decision of the court granting or refusing a rehearing is final, and it is not reviewable by appeal or by mandamus. 18 Am. & Eng. Enc. Pl. & Pr. p. 7.

"Nor can the same court, at a subsequent term, vacate an order which it has previously made, denying an application for rehearing. 100 Ill. 463." 18 Am. & Eng. Enc. Pl. & Pr. p. 7.

(B.) The State cannot now be heard to claim anything by reason of the condition of the record in this case.

Statement.—As is well known to this court, this cause was appealed (and jurisdiction attached under art. 884 Code of Crim. Proc.) and the judgment was affirmed, after the matter had been under consideration by this court for several months, on
71 December 20th, 1905, and taken within fifteen days, appellant filed his motion for rehearing, which was overruled on the 24th day of March, 1906. The State, neither before the original judgment of affirmance was rendered, nor while the motion for rehearing by appellant was pending, filed any suggestion or motion, or made any point whatever of the facts now complained of in the motion that is now before the court.

Authorities.

Garner *v.* State, 36 Texas, 694, where the court says: "Where defect in record on appeal was known to the attorney for the State, and yet he saw proper to submit the case for the decision of the court, he must abide the consequences."

Fort Worth Pub. Co. *v.* Huston & Reed, 80 Texas, 254: "The mere fact that the court has overlooked a certain point presented

by the record is not sufficient to authorize a rehearing, however, unless it further appears that its attention was called to the point in question by the briefs or arguments of counsel."

18 Am. & Eng. Enc. Pl. & Pr., page 37: "If parties appealing to this court do not take the trouble to call attention to the points upon which they rely, they cannot reasonably expect us to order rehearings for the purpose of considering them by piecemeal." Whitby *v.* Rowell, 82 Cal. 365, (cited at p. 38—18 Ency. Pl. & Pr.)

"The court will not consider whether the original judgment was appealable, nor whether the appeal was properly perfected, nor whether the parties have complied with the rules of practice prescribed by the court, when these questions are presented for the first time by the petition for rehearing." 18 Am. & Eng. Enc. Pl. & Pr. pp. 41 and 42. The above doctrine is also supported by *Ex parte* Juneman *et al.* 28 Tex. Cr. App. 486.

"Where the return of the lower court states that 'judgment
72 was in due form entered,' a rehearing cannot be had on the ground that the judgment appealed from had not been entered, when the appeal was taken, although the return does not set out the judgment *in extenso;* since, although defective in this respect, it might have been amended on proper application, and the defect was waived by failure to amend on the hearing." Gates *v.* Williams (C. Pl. Gen. T.) 10 Misc. (N. Y.) 403, cited under note 3, page 1, 18 Am. & Eng. Ency. Pl. & Pr. Collins *v.* State, 16 Tex. Cr. 274.

And we especially call attention to the following: "*A rehearing cannot be had for the purpose of obviating certain unfortunate results which may follow under the terms of the original judgment and opinion.*" (Italics ours.) Mann *v.* Peo. 40 S. Car. 1. (18 Am. & Eng. Ency. Pl. & Pr. p. 42, note 2).

And also the following citations: "*A rehearing will not be granted on the ground that petitioner has failed to argue an important point on the hearing. All points relied upon in support of the case must be presented by the briefs and arguments on appeal,* and the practice of reserving certain points to be urged subsequently, in the event of an adverse decision, is condemned by the courts." (Italics ours.) 18 Am. & Eng. Ency. Pl. & Pr. page 43, note 4.

"*The Supreme Court will not, after the submission of a case, and after its decision, grant a rehearing and award a certiorari to perfect the record, when the motion to rehear is based on the defectiveness of the record, and when no excuse is offered to show why the defect was not discovered before the submission.* (Italics ours.) Ross v. McGowen *et al.*, 68 Tex. 603; Davis *v.* McGehee, 24 Tex. 209; Hilburn *v.* Harris, 2 Tex. Cr. App. 395; cited at page 47 note 4, 18 Am. & Eng. Ency. Pl. & Pr. See page 47, 18 Am. & Eng. Enc. Pl. & Pr.

Exceptions to rule, and Texas cases cited under note 2: Stafford *v.* Perker, Dall. (Tex.) 380.

73 "At common law, as a general rule, the petition must be filed before the end of the term at which the case is decided, and in most jurisdictions, a failure to make the application within

this period is fatal, exceptions to the rule not being recognized by the courts." 18 Am. & Eng. Enc. Pl. & Pr. page 52, and note 6. Chambers *v.* Hodges, 23 Tex. 104; Burr *v.* Lewis, 6 Texas 76.

"See cases construing rules of Supreme Court on motion for rehearing."

Bulridge *v.* Scott, 48 Texas 178.
Howard *v.* McKenzie, 54 Tex. 171.
Sams *v.* Creager, 85 Tex. 497.
Ho. etc. R. Co. *v.* Grigsby, 43 Tex. Civ. App. 639.
Franklin *v.* Hulbert, 1 Tex. App. Civ. Cas, sec. 203 (18 Am. & Eng. Enc. Pl. & Pr. p. 54, note 2).

"When a petition, filed within the statutory time, has been overruled, the court cannot, at a subsequent term, set aside its former order denying the application, and grant a rehearing of the cause."

Gratiot *v.* Mo. Pac. R. Co. 116, Mo. 450 (Cited at page 56, 18 Am. & Eng. Enc. Pl. & Pr., p. 55, note 2).

C. A party cannot have the record of the lower court corrected in any way upon motion for rehearing, even when that motion has been filed within the proper time, and in a proper manner, unless the matter intended to be corrected is set out in form of a certified copy of the record as it exists in the court below.

Statement.—The State's motion in this case after affirmance, and after the overruling of the motion filed by appellant for a rehearing is "to reform and affirm" the judgment of the court below. *The motion is not accompanied by any affidavit that a correct judgment was entered in the court below.*

Authorities.

Cannady *v.* State, 37 Tex. App. 123.
Collins *v.* State, 16 Tex. Cr. App. 274.

In the above cause, this court held that the affidavit of a
74 deputy clerk, that the recognizance as sent up in the record was incorrectly copied by him into the record, a proper recognizance having, in fact, been entered into, as stated in his affidavit, that the matter was not so presented that this court could consider it, and the motion was denied upon that ground.

In the case at bar, the State is seeking to have, not a judgment that was correctly entered in the court below now made a part of the record, *but to have a judgment entered here for the first time;* and we take it, in any event, that before the State could be heard to have such a judgment entered here, it would have to be shown *that there was, in fact, such a judgment entered in the court below,* but not correctly copied into the record by the clerk, and then it would have to proceed either by motion for rehearing with a certified copy of the judgment as actually entered in the court below (under the authority of the Cannady case) or it would have to move for a certiorari.

As presented, this court would be without authority to grant th relief, even if the judgment had been properly entered in the cou below, unless the rule as to certiorari, or as to accompanying a m tion for a rehearing with a certified copy upon the point, as lai down in the Cannady case was complied with.

(D.) The decree of the lower court, which has been appeale from, cannot be modified on rehearing in the appellate court.

Authorities.

18 Am. & Eng. Enc. of Pl. & Pr., p. 62, note 1.

(E.) A party to an appeal cannot complain of a judgment i his favor, and ask a rehearing of that judgment.

Authorities.

Maddox *v.* State, 14 Tex. Court of App. 488 (motion for r hearing).

75 Remarks.—In the case at bar as in the Maddox case, ther is no pretense that the original judgment of this court is i any respect not perfectly correct as to essentials, etc., and this cour while it has the power over its own judgments to correct them an to enforce them, it has not the power to go behind its own judgmen and correct the judgment appealed from, either at the request of th party in favor of whom the judgment of this court was rendered, o upon its own motion, after its judgment has been rendered and tim for rehearing has passed. Nor will it grant rehearing to the part in whose favor the judgment of this court has been rendered, unles the court overrules the authority of the Maddox case, *supra*, and t do so would be bad principle, and contrary to the weight of au thority.

Ninth. This court's said opinion is further erroneous in holdin that the case of Longoria *v.* State, 44 S. W. 1089, is not authorit in this cause, because the facts and conditions were exactly simila in said case as in this case, and *all questions*, involved under the la by the facts of the Longoria case were before this court, and th adjudication of said case by this court was upon the whole case befor the court, and the court's authority was as much invoked in that cas as it is in this case "to reform," and the court with the *whol record before it*, and with its power invoked in regard to the judg ment, held that it could only dismiss the appeal *because there wa no final judgment in the court below*, and that holding is decisiv of the question, and binding upon this court in this case, unless thi court now wishes to overrule said case in express terms and announc a new and different rule of law.

76 Tenth. Said opinion of this Court is further erroneous i holding that the sentence is "in effect" the judgment of th court, because without a judgment, *at least prima facie sufficien and on its face complying with all of the requisites of art.* 831, *Cod*

of Criminal Procedure, including subdivisions nine and ten, sentence would be unauthorized, and in this case was unauthorized, and therefore this case stands as though sentence had never been passed, because it was unauthorized by reason of the fact *that no final judgment, prima facie good upon its face,* complying with the requirements of article 831 Code of Criminal Procedure, had been previously rendered and entered.

Remarks.—Sentence is distinct from and independent from the judgment. Arcia *v.* State, 26 App. 193.

While it is the last act in the matter of finally disposing of the defendant, it must be preceded by a judgment, at least *prima facie* good on its face, and *prima facie* in compliance with all of the requisites of article 831, Code of Criminal Procedure, including subdivisions 9 and 10. (Mapes *v.* State, 13 App. 85.)

The sentence is to a criminal case what an execution is to a civil case, and both are dependent upon and follow the judgment. In a civil case execution cannot issue until a judgment, *prima facie* good on its face, has been rendered and entered, and so in a criminal case the sentence being the execution of the judgment upon the defendant, and being in the nature of a levy, upon the defendant by virtue of the judgment, cannot be entered until such a judgment has first been rendered and entered.

Eleventh. This court's said opinion is further erroneous in that it, in effect, deprives appellant of that due process of law guaranteed
him by the Constitution of the State of Texas, and that of the
77 United States, in this: that it is in effect, the rendering of a
judgment against him in his absence, and the authorization of sentence against him without a judgment.

Conclusion.—In conclusion we again insist, as we did in our original brief upon this motion, that this court is without authority to grant this motion, and that had the question been raised before the case had been affirmed, or after affirmance, upon rehearing within fifteen days of the date of the judgment, which was rendered on December 20th, 1905, this court could then not have reformed or corrected the judgment, but if it had made any order at all, under the great weight of authority, would have reversed and remanded the case for another trial, but under some exceptional cases, would have dismissed the appeal.

To restate: The power of this court under Article 904, Code of Criminal Procedure, deducible from the weight of authority, is as follows:

(*a.*) Where there is a judgment entered, which is *prima facie* sufficient, and the judgment conforms to the indictment and verdict, and the sentence does not conform to the judgment, this court has power to reform the sentence and correct it so as to make it conform to the judgment, verdict and indictment.

(*b.*) Where the indictment is for one offense, and the verdict of the jury finds the defendant guilty of that offense, and the judgment *prima facie* complete entered up adjudges the defendant guilty of a different offense, and of an offense not comprehended within the indictment, and sentence follows the erroneous judgment, but must

either reverse and remand the case, or reverse and dismiss, the weight of authority being with the proposition that it should reverse and remand.

(*c.*) Where there is no judgment, or what amounts to no judgment, as in the case at bar, and the court's attention is called to that fact before the case is affirmed, or upon rehearing, and before rehearing is overruled, this court, in such case, under the weight
78 of authority, should reverse and remand, but at all events it could not reform or correct, while it might, under some exceptional and isolated authorities, reverse and dismiss. In the Longoria case, 44 S. W. p. 1089, this court, in a judgment identical with this one, where its attention was called to it before the case was affirmed, reversed and dismissed the case.

(*d.*) After affirmance, and rehearing has been denied, while this court has control over its own judgments to the extent that it can correct any clerical error in them, or to the extent of having them enforced, it cannot even dismiss an appeal for the want of a judgment, but jurisdiction having attached under article 884 Code of Criminal Procedure (See *Ex parte* Juneman *et al.*, 28 App. p. 846) and this court having affirmed the case and denied rehearing, the State, in whose interest the judgment of this court was rendered, cannot be heard to complain of the judgment of this court, nor has this court the power to go behind its own judgment under such conditions, and reverse and dismiss the appeal, or in any manner add to the original judgment of the court below.

(*e.*) But if this court should decide all the other propositions laid down by us against us as to its power, it still can not do more than to cancel its own judgment and dismiss the appeal, if, indeed, the court should hold it has even that power under the state of case here presented.

Longoria *v.* State, 44 S. W. 1089.

In other words, as deducible from the authorities, and largely by the weight of authority, this court can, under said article 904 of the Code of Criminal Procedure, only correct a judgment *prima facie* in compliance with art. 831 C. C. Proc., that has been actually rendered in the court below where sentence does not conform to the judgment, verdict and indictment, the sentence can be cor-
79 rected; but where both the judgment and the sentence are for a different offense than that charged in the indictment and found by the verdict of the jury, this court has not the authority to reform or correct at any time, its authority being confined to a judgment good on its face, rendered for the proper offense, and where the wrong number of years, or a sentence for the wrong offense has been had. And in the case at bar, this court has no power or authority at this time to do anything other than whatever may be necessary to correct some defect in its own judgment, or to enforce that judgment. And, as insisted in the original brief, and upon oral argument by us, we urge that the original judgment of this court is not defective (though we think bad law) and that unless some agency entirely extraneous to this court's judgment should

ntervene, there will be nothing to prevent its being carried into ef-
fect.

Therefore, we pray that this court grant this rehearing and that it refuse the State's said motion, and respectfully submit this our motion for rehearing upon said motion to "reform and affirm."

BROCKMAN & KAHN,
A. G. BOARD,
T. S. HENDERSON, AND
DOREMUS & BUTLER,
Counsel for Appellant.

Endorsed: No.. 3499. 4th Assignment. Wm. McCorquodale, appellant *v.* The State of Texas, Appellee. Appellant's motion for a rehearing upon the State's motion to "reform and affirm." Filed in Court of Criminal Appeals, at Tyler, Texas, December 4, 1906. E. B. Wiggins, Clerk.

80 *Order Overruling Appellant's Motion for Rehearing Upon Judgment Reforming and Affirming.*

Order Overruling Appellant's Motion for Rehearing Upon Judgment Reforming and Affirming the Cause.

WEDNESDAY, *December 19th,* 1906.

No. 3499, 4th.

WILLIAM MCCORQUODALE
vs.
THE STATE OF TEXAS.

Appeal from Brazos County.

This cause came on to be heard on appellant's motion for a rehearing, and the same being considered by the Court, said motion is overruled.

81 *Petition for Writ of Error.*

Filed Feb. 16, 1907.

Petition for Writ of Error to Supreme Court of the United States.

UNITED STATES OF AMERICA, *State of Texas:*

In the Court of Criminal Appeals of Texas.

No. 3499.

WILLIAM MCCORQUODALE
vs.
THE STATE OF TEXAS.

To the Honorable W. L. Davidson, Presiding Judge of the Court of Criminal Appeals of the State of Texas:

The petition of William McCorquodale respectfully shows that on the 21st day of November, 1906, the Court of Criminal Appeals of the State of Texas, rendered a judgment against your petitioner in a certain cause wherein the State of Texas was plaintiff and your petitioner was defendant, and wherein on appeal to the said Court of Criminal Appeals your petitioner was appellant, and the State of Texas was appellee, whereby the said Court of Criminal Appeals ordered, adjudged and decreed that a judgment theretofore rendered on the 27th day of March, 1905, by the district court in and for Brazos county, in the State of Texas in said cause, be reformed and corrected and as so reformed that said judgment be affirmed, and thereafter, in accordance with the law in such cases provided a motion for rehearing was duly filed by your petitioner, which was afterwards on the 19th day of December, 1906, duly considered by said Court of Criminal Appeals, and on said date by its judgment duly entered, in all things overruled, whereby said judgment of date November 21st, 1906, became and is the final judgment and decree of said Court of Criminal Appeals of the State of Texas, by which said judgment it was considered ordered and adjudged that your petitioner was guilty of the offense of murder in the first degree, and that he (William McCorquodale, your petitioner) be punished as had been determined, by imprisonment for life in the pen-
82 itentiary, and that the State of Texas do have and recover of and from your petitioner all costs of the prosecution in said cause, as will appear by reference to the record and proceedings in said cause; and that said Court of Criminal Appeals is the highest court of said State in which a decision in said cause could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes of the United States, because in said cause your petitioner specially set up and claimed certain rights, privi-

eges and immunities under the Constitution of the United States nd the decision of said Court of Criminal Appeals was and is gainst the rights, privileges and immunities so set up and claimed n the following particulars.

(1) Because in the said District court of Brazos county, Texas, rom which said cause was appealed to the Court of Criminal Ap eals of the State of Texas, no final judgment was rendered against our petitioner as will more fully appear from the record in said ause, and by reason of said fact, the said Court of Criminal Appeals cquired no jurisdiction to render any judgment therein, except a udgment dismissing said cause for want of jurisdiction, and the endition of said judgment by said Court of Criminal Appeals was n attempted exercise of jurisdiction which it did not have by the aw creating it, and had the effect to deprive your petitioner of his iberty without due process of law, in violation of section one, of the ourteenth Amendment to the Constitution of the United States.

(2.) Because no final judgment was entered in the district court f Brazos county, Texas, in said cause as will more fully appear from the record therein and the Court of Criminal Appeals
3 of Texas under the law creating and controlling it, had no power or jurisdiction to enter a final judgment in said cause, nd its attempt to enter a final judgment therein was the attempted xercise of a power and jurisdiction which was not conferred upon aid court by the law creating it, and had the effect to deprive your etitioner of his liberty without due process of law, and was in viola ion of section one of the Fourteenth Amendment to the Constitu ion of the United States.

(3.) Because no final judgment was rendered in the district court f Brazos county, Texas, in said cause, as will appear from the ecord therein, and because the rendition and entry of said final udgment by the Court of Criminal Appeals (if otherwise valid) was nade when your petitioner was not personally present, and for said eason was without due process of law, and would have the effect, if nforced, to deprive your petitioner of his liberty without due process f law, in violation of section one of the Fourteenth Amendment to he Constitution of the United States.

(4.) Because the district court of Brazos county, Texas, did not nter in said cause a complete judgment, and the entry made by said ourt and styled a "judgment" in the record, was incomplete and as lacking in essential particulars and could not have been enforced gainst your petitioner; and the Court of Criminal Appeals by its aid judgment attempted to supply said essential elements of said udgment, so as to make said judgment complete and final, and the aid Court of Criminal Appeals was without jurisdiction, by the law reating and controlling it to make said additions to said judgment, nd its attempt to do so was in effect an attempt to enter an original udgment in said cause, which said Court of Criminal Appeals by he law creating and controlling it had no power, jurisdiction or au hority to do, and the effect of said judgment, if enforced, will be to deprive your petitioner of his liberty, without due process,
4 in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

(5.) That all said things set out in the next preceding paragraph hereof (Number 4) were done and all said proceedings were had in and by said Court of Criminal Appeals, when your petitioner was not personally present, and by reason thereof would have the effect, if said judgment shall be enforced, to deprive your petitioner of his liberty, without due process of law, and in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

All of which appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States and for citation, and that the mandate heretofore issued in this cause be recalled, and the judgment therein suspended, pending the determination of said writ of error, and for such orders as may be proper respecting the custody of your petitioner until said cause is finally determined; and as in duty bound your petitioner will ever pray.

Respectfully,

ANDREWS, BALL & STREETMAN,
Attorneys for Petitioner, William McCorquodale.

85 *Fiat of Presiding Judge Davidson, Granting Writ of Error.*

Fiat of Presiding Judge Davidson.

The writ of error prayed for is granted.

The clerk of this Court, at Tyler, Texas, will make out and deliver to plaintiff in error, a correct transcript of the papers of the cause, on demand of the said plaintiff in error, upon his compliance with the law and practice governing such causes.

W. L. DAVIDSON,
Presiding Judge of the Court of Criminal Appeals of the State of Texas.

Endorsed: No. 3499. Wm. McCorquodale, plaintiff in error *vs.* The State of Texas, defendant in error. In the Court of Criminal Appeals of Texas. Petition for Writ of Error to United States Supreme Court. Filed in Court of Criminal Appeals, at Tyler, Texas. February 16, 1907. E. B. Wiggins, Clerk.

86 *Assignments of Error.*

Filed Feb'y 16, 1907.

UNITED STATES OF AMERICA, *State of Texas:*

In the Court of Criminal Appeals of Texas.

No. 3499.

WILLIAM MCCORQUODALE, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Now comes the said plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Criminal Appeals of the State of Texas, in the above entitled cause, there is manifest error in this, to-wit:

(1.) The Court of Criminal Appeals erred in its certain judgment entered in said cause on the 21st day of November 1906, wherein and whereby the said Court of Criminal Appeals attempted to add to the judgment rendered by the trial court the following language, to-wit:

"It is therefore considered, ordered and adjudged by the Court that the defendant, William McCorquodale, is guilty of the offense of murder in the first degree as found by the jury, and that he, said William McCorquodale, be punished as has been determined by the jury by imprisonment for life in the penitentiary. And it is further ordered adjudged and decreed by the court that the State of Texas do have and recover of and from the defendant, William McCorquodale all costs of this prosecution, for which execution may issue, and that the said defendant is now remanded to jail to remain in custody to await the further order of the Court."

Because the addition of said language to said judgment had the effect of adding thereto certain essential portions which were
87 necessary in order to constitute said judgment a complete and final judgment, and which were not contained in the judgment rendered by the District Court of Brazos County, Texas, in said cause, and the Court of Criminal Appeals by the law creating and controlling it, was without power, authority or jurisdiction to make said additions to said judgment so as to make the same a complete judgment, and said Court being without jurisdiction to enter said judgment as aforesaid, its attempt to do so, if enforced, will have the effect to deprive your petitioner of his liberty without due process of law, and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(2.) The Court of Criminal Appeals erred in attempting to render or enter any judgment whatever in this cause, except a judgment dismissing said cause on account of a want of jurisdiction on the part of said Court of Criminal Appeals, by reason of the fact that no complete or final judgment was rendered or entered in said

cause by the District Court of Brazos county, Texas, from which said cause was appealed to the Court of Criminal Appeals of the State of Texas, and the entry contained in the record of said cause and styled a judgment was in fact neither a complete or final judgment, and the Court of Criminal Appeals could not and did not acquire any jurisdiction over said cause by an appeal from said judgment, and the attempt of the Court of Criminal Appeals to add to said judgment so as to make the same a complete and final judgment, and thereupon to affirm said judgment as so completed, was an attempted exercise of a jurisdiction not conferred upon said Court of Criminal Appeals by the law creating and constituting it, and its effect, if said judgment be enforced, will be to deprive your petitioner of his liberty without due process of law, and in violation of Section 1 of the 14th Amendment to the Constitution of the
88 United States.

(3.) The Court of Criminal Appeals of the State of Texas erred in rendering and entering on the 21st day of November, A. D. 1906, its judgment as appears from the record in this cause, wherein it attempted to add to the purported judgment of the district court of Brazos county, Texas, the language hereinbefore set out, and thereupon to affirm said judgment, because the entry styled a "judgment" of the district court of Brazos county, Texas, was not a complete or final judgment against your petitioner and could not have been enforced against him, and the addition of said clauses to said purported judgment by the Court of Criminal Appeals, was in effect the rendition and entry of an original judgment by said Court of Criminal Appeals of the State of Texas, convicting your petitioner of an offense of the grade of felony and adjudging that he be punished by imprisonment for life in the penitentiary, and all of said proceedings were had when your petitioner was not personally present, and for said reason the effect of said judgment so rendered and entered by the Court of Criminal Appeals of Texas will, if enforced, be to deprive your petitioner of his liberty without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(4.) The Court of Criminal Appeals erred in its judgment overruling the motion for a rehearing filed by your petitioner, seeking to vacate and set aside said judgment of the 21st day of November, 1906, because the Court of Criminal Appeals had no jurisdiction to enter any judgment in said cause except a judgment dismissing said cause on account of a want of jurisdiction for the reasons more fully set out in paragraph one of this assignment of errors.

(5.) The Court of Criminal Appeals erred in its judgment overruling your petitioner's motion for a rehearing, seeking to
89 set aside and vacate said judgment of the 21st day of November, 1906, because the Court of Criminal Appeals had no power, jurisdiction or authority under the law creating and controlling it, to add to the purported judgment of the district court of Brazos county, Texas, the language which was attempted to be added thereto by said Court of Criminal Appeals, so as to make said judgment a complete and final judgment, whereas no complete or

final judgment had been rendered in said cause by the district court of Brazos county, Texas.

(6.) The Court of Criminal Appeals erred in overruling your petitioner's motion for a rehearing seeking to set aside and vacate said judgment of the 21st day of November, 1906, because said purported judgment entered by said Court of Criminal Appeals was in effect the rendition and entry of an original judgment in said cause, adjudging your petitioner to be guilty of an offense of the grade of felony, to-wit: the offense of murder in the first degree, and that he be punished by imprisonment for life in the penitentiary, whereas no such judgment was rendered or entered in the trial court, to-wit: the district court of Brazos county, Texas, and all of said proceedings were had in the Court of Criminal Appeals, when your petitioner was not personally present, and for said reason were without due process of law.

That on account of each and all of the errors hereinbefore pointed out, the effect of said judgment so rendered by the Court of Criminal Appeals on the 21st day of November, A. D. 1906 and its judgment thereafter rendered overruling your petitioner's motion for a rehearing in said cause, if enforced, will be to deprive your petitioner of his liberty without due process of law, and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

Respectfully,

ANDREWS, BALL & STREETMAN,
Attorneys for William McCorquodale, Plaintiff in Error.

90 Endorsed: No. 3499. Wm. McCorquodale, Plaintiff in Error *v.* The State of Texas, Defendant in Error. In the Court of Criminal Appeals of Texas. Assignment of Errors accompanying petition for Writ of Error to United States Supreme Court. Filed in Court of Criminal Appeals at Tyler, Texas, February 16, 1907. E. B. Wiggins, Clerk.

91 THE STATE OF TEXAS:

I, E. B. Wiggins, Clerk of the Court of Criminal Appeals of the State of Texas, at Tyler, do hereby certify that the above and foregoing ninety (90) pages, contain a true and correct copy of all the proceedings had in cause No. 3499, William McCorquodale, appellant, *vs.* The State of Texas, Appellee, appealed from Brazos county, as the same appear on file in my office,—with the exception of such papers as were agreed between counsel to be omitted from the transcript, which agreement is embodied on page 2 of this transcript.

Given under my hand and seal of office, at Tyler, Texas, this the second day of March, A. D. 1907.

[Seal Court of Criminal Appeals of Texas.]

E. B. WIGGINS,
Clerk of the Court of Criminal Appeals of the State of Texas, at Tyler.

92 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges o the Court of Criminal Appeals of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition o the judgment of a plea which is in the said Court of Criminal Ap peals of the State of Texas, before you, or some of you, betwee William McCorquodale, plaintiff in error, and The State of Texa defendant in error a manifest error hath happened, to the gre damage of the said William McCorquodale, plaintiff in error, as b his complaint appears. We being willing that error if any hat been, should be duly corrected, and full and speedy justice done t the parties aforesaid in -his behalf, do command you, if judgment h therein given, that then under your seal, distinctly and openl you send the record and proceedings aforesaid with all things co cerning the same, to the Supreme Court of the United States togethe with this writ, so that you have the same at Washington in n exceeding thirty days from the date hereof in the Supreme Cou of the United States, to be then and there held, that the record an proceedings aforesaid being inspected, the said Supreme Court o the United States may cause further to be done therein to corre that error, what of right, and according to the laws and customs o the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of th United States, the 15th day of February, in the year of our Lor one thousand nine hundred and Seven.

[The Seal of the U. S. Circuit Court, Northern Dist., Dallas, Texas.]

HENRY W. RHODES,
Clerk of the Circuit Court of the United States for the Northern District of Texas,
By C. B. PRICE, *Deputy.*

Allowed by—

W. L. DAVIDSON,
Presiding Judge of the Court of Criminal Appeals of the State of Texas.

[Endorsed:] No. —. William McCorquodale, Plaintiff in Erro *vs.* The State of Texas, Defendant in Error. Writ of Error. File — day of ——, A. D. 190–. —— ——, Clerk. By —— —— Deputy. Filed in Court of Criminal Appeals at Tyler, Texas, Feb ruary 16, 1907. E. B. Wiggins, Clerk.

93 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The State of Texas and R. V. Davidson, Attorney General of the State of Texas, and Felix J. McCord, Assistant Attorney General of the State of Texas, attorneys of record, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Court of Criminal Appeals of the State of Texas, at Tyler, Texas, wherein William McCorquodale is plaintiff in error and The State of Texas is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of February, A. D. 1907, and of the independence of the United States the —— year.

[Seal Court of Criminal Appeals of Texas.]

W. L. DAVIDSON,
Presiding Judge of the Court of Criminal Appeals of the State of Texas.

Attest:
E. B. WIGGINS,
Clerk of Court of Criminal Appeals of the State of Texas, at Tyler, Texas.

The State of Texas, Defendant in Error, in the above entitled cause waives service of this citation and hereby accepts service thereof.

FELIX J. McCORD,
Assistant Attorney General of the State of Texas and Attorney for the State of Texas in said Cause.

[Endorsed:] No. —. William McCorquodale, Plaintiff in Error, *vs.* The State of Texas, Defendant in Error. Citation. Filed — day of ——, A. D. 190–. —— ——, Clerk. By —— ——, Deputy. Filed in Court of Criminal Appeals at Tyler, Texas, February 16th, 1907. E. B. Wiggins, Clerk.

94 [Endorsed:] No. —. In the Supreme Court of the United States of America. William McCorquodale, Plaintiff in Error, *vs.* The State of Texas, Defendant in Error. Error from the Court of Criminal Appeals of Texas.

Endorsed on cover: File No. 20,610. Texas court of criminal appeals. Term No. 253. William McCorquodale, plaintiff in error, *vs.* The State of Texas. Filed March 11th, 1907. File No. 20,610.

Office Supreme Court, U.
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APR 4 1908
JAMES H. McKENNEY
CLERK

No. 38.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1907.

WILLIAM MCCORQUODALE, *Plaintiff in Error,*

VERSUS

THE STATE OF TEXAS.

In Error to the Court of Criminal Appeals of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR

—BY—

SAM STREETMAN,
THOMAS H. BALL,
Attorneys for Plaintiff in Error.

ANDREWS, BALL & STREETMAN,
Of Counsel.

Gray, Dillaye & Co., Printers, 110 Main Street, Houston.

IN THE

upreme Court of the United States

October Term, 1907.

ILLIAM McCORQUODALE, *Plaintiff in Error*,

versus } No. 253.

HE STATE OF TEXAS.

In Error to the Court of Criminal Appeals of the State of Texas.

BRIEF FOR PLAINTIFF IN ERROR

Statement of the Case.

(References are to pages of the Printed Record.)

On March 10th, 1905, plaintiff in error was charged by dictments in the District Court of Brazos County, Tex-, with the offense of murder. (Rec., pp. 4 and 5.) On arch 27th, 1905, there was entered on the minutes of id District Court, the same being the only judgment er entered in said court, the following:

"Judgment.

"No. 4283.

"The State of Texas,

"v.

"William McCorquodale.

"March 27th, 1905.

" This day this cause was called for trial, and the " State appeared by her district attorney, and the

" defendant, William McCorquodale, appeared in " person, his counsel also being present, and the said " defendant, William McCorquodale, having been " duly arraigned, and both parties announced ready " for trial, and the defendant, William McCorquo- " dale, in open court, pleaded not guilty to the charge " contained in the indictment herein; thereupon a " jury, to-wit, J. H. White, and eleven others, were " duly selected, empaneled and sworn, who, having " heard the indictment read, and the defendant's " plea of not guilty thereto, and having heard the " evidence submitted, and having been duly " charged by the court, retired in charge of the " proper officer to consider of their verdict, and " afterwards, on April 1st, were brought into open " court by the proper officer, the defendant and his " counsel being present, and in due form of law re- " turned into open court the following verdict:

" 'We, the jury, find the defendant guilty of mur- " 'der in the first degree, and assess his punishment " 'at confinement in the State penitentiary for life.

" 'J. H. WHITE, *Foreman.*' "

April 15th, 1905, an order was entered by said District Court of Brazos County overruling a motion for new trial which had been filed by plaintiff in error, and reciting a notice of appeal. (Tr., p. 10.)

April 15th, 1905, there was entered on the minutes of the District Court of Brazos County, a sentence, as follows (Tr., p. 11):

"Sentence.
"April 15, 1905.
"No. 4283.
"The State of Texas
"v.
"William McCorquodale.
"April 15th, 1905.

" This day this cause being again called, the State " appeared, by her district attorney, and the defend- " ant, William McCorquodale, was brought into open " court in person, in charge of the sheriff, his coun- " sel also being present, for the purpose of having " the sentence of the law pronounced against him,

" in accordance with the verdict and judgment " herein rendered and entered against him on a " former day of this term; and thereupon the de- " fendant, William McCorquodale, was asked by the " court whether he had anything to say why sentence " should not be pronounced against him, and he an- " swered nothing in bar thereof, whereupon the " court proceeded, in the presence of the said defend- " ant, William McCorquodale, to pronounce sentence " against him as follows:

" It is the order of the court that the defendant, " William McCorquodale, who has been adjudged to " be guilty of murder in the first degree, and whose " punishment has been assessed by the verdict of " the jury at confinement in the penitentiary for life, " be delivered by the Sheriff of Brazos County, Tex- " as, immediately to the Superintendent of the Peni- " tentiaries of the State of Texas, or other person le- " gally authorized to receive such convicts, and the " said William McCorquodale shall be confined in " said penitentiaries for life, in accordance with the " provisions of the law governing the penitentiaries " of said State, and the said William McCorquodale " is remanded to jail until said sheriff can obey the " direction of this sentence."

A transcript having been made up and filed in the Court of Criminal Appeals of Texas, judgment was rendered by said Court of Criminal Appeals December 20th, 1905, affirming the judgment of the District Court. (Tr., p. 28.)

A motion for rehearing, filed by plaintiff in error in the Court of Criminal Appeals, was overruled March 24th, 1906. (Tr., p. 28.)

Up to this time no notice appears to have been taken of the fact that a complete judgment had not been rendered in the District Court. This fact, however, having been discovered, on March 31st, 1906, the State's attorneys filed a motion in the following language, to wit (Tr., p. 29):

" Now comes the State, by the Assistant Attorney-

" General, and would show the court that the judg-
" ment in this cause was affirmed at Tyler, and the
" appellant's motion for rehearing was overruled at
" the Dallas term.

" That since which time it has been discovered,
" and this court's attention is now called to the fact,
" that the transcript *does not contain a complete*
" *judgment against appellant,* though sentence is
" contained in the transcript.

" Wherefore, the State prays that the court order
" the transcript and all papers transferred from
" Tyler to the Austin branch of this court, to the
" end that this court may determine its jurisdiction
" of this appeal, and whether or not the judgment
" should be reformed and affirmed, or whatever ac-
" tion this court deems necessary.

" Respectfully submitted,

"V. B. HUDSON,
"District Attorney,
"HOWARD MARTIN,
"Ass't. Att'y. Gen'l."

On April 4th, 1906, the Court of Criminal Appeals directed the transcript and all papers in the cause to be transferred to the Austin branch of the court, in order that the motion might be considered. (Tr., p. 30.)

On May 9th, 1906, plaintiff in error filed an exception and answer to the State's motion above set out, insisting, among other things, that the Court of Criminal Appeals had no power, authority or jurisdiction to enter a judgment in said cause, and had no authority to do anything except to dismiss the appeal. (Tr., pp. 30 to 33.)

On November 21st, 1906, the Court of Criminal Appeals acted upon the State's motion, and did what the majority of that court termed, "reforming and correcting said judgment." This consisted, in fact, of adding to the incomplete judgment, above set out, the following, to wit (Tr., p. 44):

" It is therefore considered, ordered and ad-

" judged by the court that the defendant, William " McCorquodale, is guilty of the offense of murder " in the first degree, as found by the jury, and that " he, the said William McCorquodale, be pun- " ished, as has been determined by the jury, by im- " prisonment for life in the penitentiary; and it is " further ordered, adjudged and decreed by the " court that the State of Texas do have and recover " of and from the defendant, William McCorquo- " dale, all costs of this prosecution, for which execu- " tion may issue; and that the said defendant is now " remanded to jail to remain in custody to await the " further order of the court."

The judgment so completed was then ordered to be affirmed. This action was based upon the opinion of two of the judges of the Court of Criminal Appeals, the majority opinion upon the question being rendered by Judge Henderson. (Tr., pp. 34 to 39.) Judge Davidson, presiding judge of the court, filed a dissenting opinion, to the effect that the judgment contained in the record did not constitute a final judgment, and an appeal therefrom conferred no jurisdiction upon the Court of Criminal Appeals, and that said Court of Criminal Appeals had no power to enter an original judgment in said cause, and was without authority to enter any judgment except a judgment dismissing the case for want of jurisdiction. (Tr., pp. 40-43.)

On December 4th, 1906, plaintiff in error filed in the Court of Criminal Appeals a motion for rehearing, complaining of the action of said court in attempting to complete the judgment of the trial court, specially setting up and claiming his rights and immunities under the Constitution of the United States to a trial by due process of law, and claiming, (1) that the action of the Court of Criminal Appeals in attempting to enter said judgment against him was a denial of due process of law, by reas-

on of the fact that it was the entry of a judgment against him in a felony case when he was not present, and (2) that it authorized a sentence against him, confining him in the penitentiary for life, without any valid judgment. (Tr., pp. 45 to 51, paragraph 11.) This motion also urged that the Court of Criminal Appeals was entirely without jurisdiction to enter the judgment against him which it attempted to enter. This motion for a rehearing was considered by the Court of Criminal Appeals and overruled December 19th, 1906. (Tr., p. 53.)

On February 16th, 1907, plaintiff in error presented and filed a petition for writ of error, accompanied with assignments of error, and said petition was granted by the presiding judge of said Court of Criminal Appeals. The writ of error in said cause is now prosecuted upon the following

ASSIGNMENTS OF ERROR.

(1) The Court of Criminal Appeals erred in its certain judgment entered in said cause on the 21st day of November, 1906, wherein and whereby the said Court of Criminal Appeals attempted to add to the judgment rendered by the trial court the following language, to wit:

> " It is therefore considered, ordered and adjudged " by the court that the defendant, William McCor- " quodale, is guilty of the offense of murder in the " first degree, as found by the jury, and that he, said " William McCorquodale, be punished as has been " determined by the jury, by imprisonment for life " in the penitentiary. And it is further ordered, ad- " judged and decreed by the court that the State of " Texas do have and recover of and from the defend- " ant, William McCorquodale, all costs of this prose- " cution, for which execution may issue, and that the

" said defendant is now remanded to jail to remain
" in custody to await the further order of the court."

Because the addition of said language to said judgment had the effect of adding thereto certain essential portions which were necessary in order to constitute said judgment a complete and final judgment, and which were not contained in the judgment rendered by the District Court of Brazos County, Texas, in said cause, and the Court of Criminal Appeals, by the law creating and controlling it, was without power, authority or jurisdiction to make said additions to said judgment so as to make the same a complete judgment, and said court being without jurisdiction to enter said judgment as aforesaid, its attempts to do so, if enforced, will have the effect to deprive your petitioner of his liberty without due process of law, and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(2) The Court of Criminal Appeals erred in attempting to render or enter any judgment whatever in this cause; except a judgment dismissing said cause on account of a want of jurisdiction on the part of said Court of Criminal Appeals, by reason of the fact that no complete or final judgment was rendered or entered in said cause by the District Court of Brazos County, Texas, from which said cause was appealed to the Court of Criminal Appeals of the State of Texas, and the entry contained in the record of said cause and styled a judgment was in fact neither a complete or final judgment, and the Court of Criminal Appeals could not and did not acquire any jurisdiction over said cause by an appeal from said judgment, and the attempt of the Court of Criminal Appeals to add to said judgment so as to make the same

a complete and final judgment, and thereupon to affirm said judgment as so completed, was an attempted exercise of a jurisdiction not conferred upon said Court of Criminal Appeals by the law creating and constituting it, and its effect, if said judgment be enforced, will be to deprive your petitioner of his liberty without due process of law, and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(3) The Court of Criminal Appeals of the State of Texas erred in rendering and entering, on the 21st day of November, A. D. 1906, its judgment, as appears from the record in this cause, wherein it attempted to add to the purported judgment of the District Court of Brazos County, Texas, the language hereinbefore set out, and thereupon to affirm said judgment, because the entry styled a "judgment" of the District Court of Brazos County, Texas, was not a complete or final judgment against your petitioner, and could not have been enforced against him, and the addition of said clauses to said purported judgment by the Court of Criminal Appeals was, in effect, the rendition and entry of an original judgment by the said Court of Criminal Appeals of the State of Texas, convicting your petitioner of an offense of the grade of felony, and adjudging that he be punished by imprisonment for life in the penitentiary, and all of said proceedings were had when your petitioner was not personally present, and for said reason the effect of said judgment, so rendered and entered by the Court of Criminal Appeals of Texas, will, if enforced, be to deprive your petitioner of his liberty without due process of law, in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

(4) The Court of Criminal Appeals erred in its judgment overruling the motion for a rehearing filed by your petitioner, seeking to vacate and set aside said judgment of the 21st day of November, 1906, because the Court of Criminal Appeals had no jurisdiction to enter any judgment in said cause except a judgment dismissing said cause on account of a want of jurisdiction, for the reasons more fully set out in paragraph one of this assignment of errors.

(5) The Court of Criminal Appeals erred in its judgment overruling your petitioner's motion for a rehearing, seeking to set aside and vacate said judgment of the 21st day of November, 1906, because the Court of Criminal Appeals had no power, jurisdiction or authority under the law creating and controlling it, to add to the purported judgment of the District Court of Brazos County, Texas, the language which was attempted to be added thereto by said Court of Criminal Appeals, so as to make said judgment a complete and final judgment, whereas no complete or final judgment had been rendered in said cause by the District Court of Brazos County, Texas.

(6) The Court of Criminal Appeals erred in overruling your petitioner's motion for a rehearing, seeking to set aside and vacate said judgment of the 21st day of November, 1906, because said purported judgment entered by said Court of Criminal Appeals was, in effect, the rendition and entry of an original judgment in said cause, adjudging your petitioner to be guilty of an offense of the grade of felony, to wit, the offense of murder in the first degree, and that he be punished by imprisonment for life in the penitentiary, whereas no such judgment was rendered or entered in the trial court, to wit,

the District Court of Brazos County, Texas, and all of said proceedings were had in the Court of Criminal Appeals, when your petitioner was not personally present, and for said reason were without due process of law.

POINTS OF LAW AND FACT.

I.

The purported judgment entered by the District Court of Brazos County, Texas, was not a complete or final judgment; and did not authorize the sentence against plaintiff in error.

Authorities.

Code of Criminal Procedure of Texas, Art. 831.
Which is as follows:

"A final judgment is the declaration of the court "entered of record, showing:
"1. The title and number of the case.
"2. That the case was called for trial, and that "the parties appeared.
"3. The plea of the defendant.
"4. The selection, impaneling and swearing of "the jury.
"5. The submission of the evidence.
"6. That the jury was charged by the court.
"7. The return of the verdict.
"8. The verdict.
"9. *In the case of a conviction, that it is consid-* "*ered by the court that the defendant is adjudged* "*to be guilty of the offense as found by the jury;* "or, in case of acquittal, that the defendant be dis- "charged.
"10. *That the defendant be punished as has been* "*determined by the jury,* in cases where they have "the right to determine the amount or the duration "and the place of punishment, in accordance "with the nature and terms of the punishment pre- "scribed in the verdict."

Longoria v. State of Texas, 44 S. W., 1089.
Pennington v. State of Texas, 11 Tex. Cr. App., 281.
Mayfield v. State, 40 Tex., 289.

Mirelles v. State, 13 Tex. App., 346.
Labbaite v. State, 4 Tex. App., 169.
Butler v. State, 1 Tex. App., 638.
Young v. State, 1 Tex. App., 64.
Calvin v. State, 23 Tex., 577.
Burrell v. State, 16 Tex., 147.
Shults v. State, 13 Tex., 401.

Remarks.

In the Mayfield case, above cited, decided in 1874, Judge Roberts says:

"A judgment of conviction rendered may be said "to consist of two parts, to wit: 1. The facts ju- "dicially ascertained, together with the manner of "ascertaining them, entered of record. 2. The re- "corded declaration of the court pronouncing the "legal consequences of the facts thus judicially as- "certained.

"Both of these parts are equally necessary in the "rendition of a judgment of conviction. Freeman, "Judgments, p. 2, Sec. 2.

"In the first part, it is usual and proper to set "forth in the minutes of the court the title and num- "ber of the case, the calling of the case for trial, the "appearance of the parties, the plea of the defend- "ant, and if not guilty, the selection, impaneling and "swearing of the jury, the submission of the evi- "dence, the charge of the court, the return of the "verdict, and the finding of the jury.

"In the second part, it should be declared upon "the record, in connection with the verdict, in the "event of a conviction, that it is considered by the "court that the defendant is adjudged to be guilty of "the offense as has been found by the jury, and that "the defendant be punished as it has been determ- "ined by the jury (in cases where they have the "right to determine the amount, or the duration "and the place of punishment), setting forth partic- "ularly the amount, or the duration and place of "punishment in accordance with the nature and "terms of the punishment prescribed in the verdict.

"There being no complete judgment of conviction

" rendered in this case, inasmuch as the second part,
" as above indicated, is wholly omitted, the case must
" be *dismissed* from this court."

This case has been cited with approval time and again, and has never been overruled.

In the Longoria case, *supra*, decided March, 1898, the record was precisely in the condition of the record here. The judgment was incomplete in precisely the particulars found in this judgment. There was no compliance with the 9th and 10th sections of the article above set out of Code of Criminal Procedure, which prescribes the requisites of a final judgment. The court there said:

" It will be observed that the ninth and tenth re-
" quisites of Art. 831, Code Cr. Proc., 1895, which de-
" fines the essential elements of a judgment, are
" omitted. These are essential matters, and the
" judgment cannot be complete in a felony case with-
" out their observance; because a final judgment, as
" required by Article 831, Code Cr. Proc., 1895, is
" not incorporated in the record, the appeal is dis-
" missed."

In the majority opinion of the Court of Criminal Appeals in the present case, referring to the above decision, it is said:

" In Longoria's case, the exact question here was
" before the court. The power to reform does not
" appear to have been called to the attention of the
" court. The case was simply dismissed, because
" it did not contain a final judgment."

Judge Henderson, who rendered the opinion, does not contend that the record did contain a final judgment. Indeed, the action of the majority of the court in adding the omitted clauses to the judgment shows that it was not a final judgment, or such action would have been unnecessary; but seemingly intent upon the statute which au-

thorizes the Court of Criminal Appeals to reform and correct a judgment, they apparently lose sight of the fact that before the court can reform or correct, or do any other thing concerning a judgment, it must first acquire jurisdiction.

This brings us to consider the second point:

II.

The Court of Criminal Appeals of Texas having only appellate jurisdiction, cannot and does not acquire jurisdiction in any case until a final judgment has first been rendered in the court from which the case is appealed.

Authorities.

Jurisdiction of Court of Criminal Appeals prescribed: (Texas Constitution, Art. V., Sec. 5):

> "The Court of Criminal Appeals shall have *appellate* jurisdiction, co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law. The Court of Criminal Appeals and the judges thereof shall have power to issue the writ of habeas corpus, and under such regulations as may be prescribed by law issue such writs as may be necessary to enforce its own jurisdiction. The Court of Criminal Appeals shall have power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction."

In the Revised Statutes of Texas, Chap. 24, embracing Arts. 1052, 1053 and 1054, the three sentences above quoted from the Constitution are copied in substance, each being numbered as a separate article.

These are the only constitutional or statutory provis-

ions prescribing the jurisdiction of the Court of Criminal Appeals.

The necessity of a final judgment in the lower court to sustain the jurisdiction of the appellate court is affirmed by the following authorities:

Longoria v. State, 44 S. W., 1089.
Darnell v. State, 24 Tex. Cr. App., 6.
Mirelles v. State, 13 Tex. Cr. App., 346.
Pennington v. State, 11 Tex. Cr. App., 281.
Labaite v. State, 4 Tex. Cr. App., 169.
Roberts v. State, 3 Tex. Cr. App., 47.
Butler v. State, 2 Tex. Cr. App., 529.
Trimble v. State, 2 Tex. Cr. App., 303.
Choate v. State, 2 Tex. Cr. App., 302.
Butler v. State, 1 Tex. Cr. App., 638.
Smith v. State, 1 Tex. Cr. App., 408.
Smith v. State, 1 Tex. Cr. App., 516.
Young v. State, 1 Tex. Cr. App., 64.
Anschieks v. State, 43 Tex. 587.
Mayfield v. State, 40 Tex., 289.
Nathan v. State, 28 Tex., 326.
Calvin v. State, 23 Tex., 377.
Burrell v. State, 16 Tex., 147.
Shannon v. State, 7 Tex., 492.
Republic v. Laughlin, Dallam, 412.
Nash v. Republic, Dallam, 631.

Remarks.

Even the long list of authorities above given, running from the Republic of Texas down to the present time, might be further extended to show that not only has the Court of Criminal Appeals never entertained jurisdiction unless a final judgment has been entered in the trial court, but in numbers of the cases cited the records were in substantially the same condition as this, and the invariable rule was to *dismiss* for *want of jurisdiction.*

It is evident that the majority of the Court of Criminal Appeals did not intend to overrule these cases, or they would have said so, but because there is some conflict in their opinions as to the extent to which they could go in reforming and correcting judgments they seem to have overlooked the fact that before they could begin to correct or reform the judgment they must acquire jurisdiction of the cause.

Judge Henderson, delivering the opinion, refers to the fluctuation in the opinions of the court as to the extent of the power to reform and correct. An examination of the cases cited by him, however, will show that while in some cases the court declined to correct the judgment or the sentence, to conform to the verdict, and in other cases they did so correct either the judgment or sentence, or both, yet in every single case in which this was done, *there was a complete judgment and sentence,* of which jurisdiction might be obtained upon appeal; but *in no case,* as shown above, *where there was wanting either a complete judgment or a complete sentence has the court ever assumed jurisdiction to correct or reform.*

It is suggested that the sentence is the final judgment which would give jurisdiction. It is sufficient to say that it does not purport to be the final judgment, but simply recites that such a judgment has been rendered. In numbers of the cases already cited there was a complete sentence, but the case was dismissed on appeal for the lack of a judgment. (Longoria v. State, 44 S. W., 1089; Pennington v. The State, 11 Tex. Cr. App., 281.)

In Maples v. State, 13 Tex. Cr. App., 91, it was said:

> " It was not only necessary to have a final judg-
> " ment properly entered against the defendant, *but*
> " *it was also necessary to follow this judgment with*

" the sentence of the law, which could not be done un-
" til there was a valid judgment."

III.

The court of criminal appeals *having no jurisdiction* to render a judgment against plaintiff in error, adjudging him guilty of murder and requiring his confinement in the State penitentiary for life, its attempt to do so, and the enforcement of such judgment has the effect to deprive him of his liberty without due process of law, contrary to Section One of Article Fourteen of the Federal Constitution.

Authorities.

Pennoyer v. Neff, 95 U. S., 714, L. Ed., Bk. 24, pp. 565, 572.

Scott v. McNeil, 154 U. S., 34; 38 L. Ed., 896, 901.

In the case of Pennoyer v. Neff, above cited, is given, perhaps, as concise a definition of due process of law as can be found. It is as follows:

" Since the adoption of the Fourteenth Amend-
" ment to the Federal Constitution, the validity of
" such judgments may be directly questioned, and
" their enforcement in the State resisted on the
" ground that proceedings in a court of justice to
" determine the personal rights and obligations of
" parties over whom that court has no jurisdiction,
" do not constitute due process of law. Whatever
" difficulty may be experienced in giving to those
" terms a definition which will embrace every per-
" missible exertion of power affecting private rights
" and exclude such as is forbidden, there can be no
" doubt of their meaning when applied to judicial
" proceedings. They then mean a course of legal
" proceedings according to those rules and princi-
" ples which have been established in our system of
" jurisprudence for the protection and enforcement

" of private rights. *To give such proceedings any* " *validity there must be a tribunal competent by its* " *constitution, that is, by the law of its creation, to* " *pass upon the subject-matter of the suit;* and if that " involves merely a determination of the personal " liability of the defendant he must be brought with- " in its jurisdiction by service of process within the " State, or his voluntary appearance."

In Scott v. McNeil, it is said:

" *No judgment of a court is due process of law if* " *rendered without jurisdiction in the court, or with-* " *out notice to the party.*"

The court then quotes with approval the definition above given by Mr. Justice Field in Pennoyer v. Neff, to the effect that, in order to constitute due process of law, "there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit."

It might be contended that the construction by the Court of Criminal Appeals of the Constitution and statutes of Texas are conclusive upon this court; in the very case cited, however, of Scott v. McNeil, we find the following language:

" Upon a writ of error to review the judgment of " the highest court of a State upon the ground that " the judgment was against a right claimed under " the Constitution of the United States, this court " is no more bound by that court's construction of a " statute of the Territory or of a State when the " question is, whether the statute provided for the " notice required to constitute due process of law, " than when the question is, whether the State creat- " ed a contract, which has been impaired by a subse- " quent law of the State, or whether the original lia- " bility created by the statute was such that a judg- " ment upon it has not been given due faith and " credit in the courts of another State. In every " such case this court must decide for itself the true

" construction of the statute. Citing, Huntington v.
" Attrill, 146 U. S., 657, 683, 684; Mobile & O. R. Co.
" v. Tennessee, 153 U. S., 486; 38 L. Ed., 793."

If a State court could assume jurisdiction to render a judgment which, under the law of its creation, it has no jurisdiction to render, and if the Supreme Court of the United States were concluded by the decision of the State court holding that it had jurisdiction, there could be no protection to the citizen against an usurpation of jurisdiction on the part of State courts. The State courts could render judgments affecting the property, the lives and liberty of citizens, which the laws creating such courts gave them no power to render, and yet this court would be powerless to interfere, because, forsooth, the State court held that it had the jurisdiction which it attempted to exercise. We think it clear, both upon reason and authority, that the rule of this court, according to State courts the right to construe their own Constitution and statutes, presupposes that the State court is invested with jurisdiction, in the first place, to pass upon the question involved, but that this court is by no means precluded by the opinion of the State court from inquiring into the question whether, under the Constitution and statutes of the State, a court had jurisdiction to render the judgment which it attempted to render.

IV.

If the Court of Criminal Appeals should be held to have had jurisdiction to enter a final judgment, the entry of such judgment was such a part of the *trial* as required the presence of the defendant, under the rules of the common law, and the entry of such judgment in his absence was a denial of that due process of law guaranteed to him under Section 1 of Article 14 of the Constitution of the United States.

Authorities.

Maples v. State of Texas, 13 Tex. Ct. App., 85.

Articles 872, 819, 825, 833, 834 and 837, Texas Code of Criminal Procedure (copied below).

Schwab v. Berggren, 143 U. S., 442; 36 L. Ed., 218.

Hopt. v. Utah, 110 U. S., 574; 28 L. Ed., 262.

Ball v. United States, 140 U. S., 118; 35 L. Ed., 377.

Lewis v. U. S., 146 U. S., 374; 36 L. Ed., 1013.

Art. 596, Texas Code Crim. Proc., as follows:

> "In all prosecutions for felonies the defendant "must be personally present on the trial."

The following articles, above cited, from the Texas Code of Criminal Procedure, throw some light upon the question to be discussed:

Article 872, Code of Criminal Procedure, provides:

> "A defendant in any criminal action upon *convic-* "*tion* has the right of appeal under the rules herein- "after prescribed."

What is meant by "conviction" under the Texas statute is rendered entirely clear by reference to the following articles, in which it will be seen that by "conviction" is meant the rendition of the judgment against the defendant which was not rendered in this case in the court below, but was attempted to be rendered by the Court of Criminal Appeals, the defendant not being present at the time. The distinction between the "conviction" and the "sentence" is perfectly manifest from the following articles:

Article 819, Code of Criminal Procedure, is as follows:

> "A new trial must be applied for within two days "after the 'conviction,' but for good cause shown "the court, in cases of felony, may allow the applica- "tion to be made at any time before the adjourn-

"ment of the term at which the 'conviction' was "had."

Article 825 defines a "motion in arrest of judgment." Article 826 provides:

"The motion must be made within two days after "'*conviction,*'" etc.

Article 833 shows that the sentence is an entirely different thing from the "conviction" as above mentioned. It provides as follows:

"If a new trial is not granted, nor the judgment "arrested in cases of felony, the sentence shall be "pronounced in the presence of the defendant at any "time after the expiration of the time allowed for "making the motion for a new trial, or the motion "in arrest of judgment."

As showing conclusively that the judgment of conviction is not the sentence, we call attention to Article 834, providing that in cases where the death penalty is assessed, an appeal from the judgment of *conviction* is allowed *without sentence* being passed. That article is as follows:

"When an appeal is taken in cases of felony where "the verdict prescribes the death penalty, sentence "shall not be pronounced, but shall be suspended un-"til the decision of the Court of Appeals has been "received."

As further showing that it was never intended that an original judgment of conviction should be entered by the Court of Criminal Appeals, we call attention to Article 875, Code Criminal Procedure, which is as follows:

"The defendant in a criminal action need not be "personally present upon the hearing of his case in "the Court of Criminal Appeals, but he may appear

" in person in cases where, by law, he is not commit-
" ted to jail upon appeal."

Inasmuch as in all felony cases he must be committed to jail pending the appeal, it is quite clear that no power was ever intended to be conferred upon the Court of Criminal Appeals to render a judgment or pronounce a sentence, either of which requires the personal presence of the defendant. That this power was not intended to be conferred upon the Court of Criminal Appeals is apparent from Article 837, Code of Criminal Procedure, in which that power is conferred upon the trial court:

" Where, from any cause whatever, there is a
" failure to enter judgment and pronounce sentence
" upon conviction, during the term, the judgment
" may be entered and the sentence pronounced at
" any succeeding term of the court, unless a new
" trial has been granted, or the judgment arrested,
" or an appeal has been taken."

We have quoted the above articles from the statutes in order to make it perfectly plain that it is necessary for the defendant to be present when the *judgment of conviction* is rendered against him; that the sentence is an entirely separate and distinct proceeding from the rendition of the judgment, and that the presence of the defendant is just as necessary at the time the judgment is rendered as when the sentence is pronounced. This question is not discussed in the opinion of the Court of Criminal Appeals in this case, although it was distinctly raised in the motion for a rehearing filed by defendant, which motion was considered by the court. In the former opinions of the Court of Criminal Appeals, however, the precise question was discussed at length and the opinion of that court abundantly sustains the contention made by the defendant in this case.

In the case of Mapes v. State, 13 Tex. App., 85, the defendant had been tried and a verdict rendered against him at the March term, 1882, of the District Court. The judgment, however, was not entered in the trial court, and the defendant having attempted to appeal, his appeal was dismissed by the Court of Appeals, because of the absence of a judgment in the record. At the September term, 1882, of the District Court, upon motion of the State's attorney, a judgment was entered against the defendant *nunc pro tunc*. The defendant was not present in the trial court when this judgment *nunc pro tunc* was entered. The discussion of the Court of Criminal Appeals in this case is so conclusive upon the question here involved that we quote from it as follows:

> " Our Code of Criminal Procedure provides that " ' in all prosecutions for felonies, the defendant " ' must be personally present on the trial.' (Art. " 596.) It is also further provided, specifically, " that the defendant in every case of felony shall " be present when either of the following proceed- " ings are had, viz: 1, when the jury wish to com- " municate with the court; 2, when the jury ask fur- " ther instructions of the judge touching any mat- " ter of law, and when the court gives such instruc- " tions; and 3, when a witness is recalled and re- " examined at the request of the jury. (Code Crim. " Proc., Arts. 695, 696, 697, 698.)
>
> " Art. 720, Code Criminal Procedure, provides, " that 'in every case of acquittal or conviction judg- " ' ment shall be entered immediately,' and Article " 791 prescribes the requisites of this judgment in " felony cases. Article 797 provides that 'Where, " ' from any cause whatever, there is a failure to en- " ' ter judgment and pronounce sentence upon con- " ' viction during the term, the judgment may be en- " ' tered and sentence pronounced at any succeeding " ' term of the court,' etc. The sentence follows the " judgment, and cannot properly be pronounced un- " til after the judgment has been entered, and the

" sentence must be pronounced in presence of the " defendant. (Code Crim. Proc., Arts. 792, 793.) " There is no provision of the code which, in express " terms, requires the presence of the defendant in " court when the judgment is entered. In misde- " meanor cases we find the following provision: " ' The judgment in cases of misdemeanor may be " ' rendered in the absence of the defendant.' (Code " Crim. Proc., Art. 804.) This, we think, excludes " the idea that it may be done in a felony case, and " is equivalent to an express provision requiring the " presence of the defendant in a felony case when " the judgment is rendered.

" We have cited, we believe, all the provisions of " our code which relate to the question under consid- " eration. We will now refer to such decisions of our " Supreme Court and of this court as have treated " of this subject. In Brown v. The State, 38 Texas, " 485, it is said: 'The accused should not only be " ' within the walls of the court house, but he should " ' be present where the trial is conducted, that he " ' may see and be seen, hear and be heard, under " ' such regulations as the law has established.'

" In Gibson v. The State, 3 Texas Cr. App., 437, it " was held that the defendant in a felony case must " be present in court upon the hearing and determin- " ation of his motion for a new trial; and it appear- " ing affirmatively in that case that he was absent, " the judgment was for that cause reversed. In the " opinion in that case, by Judge White, the authori- " ties bearing upon the subject are thoroughly re- " viewed in connection with the provisions of our " code. The doctrine of this case is reaffirmed in " Beckley v. The State, 4 Texas Ct. App., 122; " Krautz v. The State, *Id.*, 534; Garcia v. The State, " 5 Texas Ct. App., 237; Sweat v. The State, 4 Texas " Ct. App., 617.

" It has been held in two cases that, in a capital " case, it was not necessary that the defendant " should be present in court at the drawing of the " special venire. (Pocket v. The State, 5 Texas Ct. " App., 552; Cordova v. The State, 6 Texas Ct. App., " 207.)

"In Rothschild v. The State, 7 Texas Ct. App., 519, " it was held that an application for a change of

" venue, and the hearing thereof, are proceedings " preliminary to the trial, and not part of the trial " itself, and that it was not, therefore, necessary that " the defendant should be personally present when " the same was heard and determined, but that the " better practice is to have the defendant personally " present whenever any proceeding, however trivial, " is had in the case.

" We deduce from these decisions that it is an im- " proper practice to take any step, or have any pro- " ceeding, however trivial, formal or unimportant it " may appear to be, when the defendant is not pres- " ent, and that it is material error, which will render " the proceedings absolutely void, where such pro- " ceeding is had during the trial of the case in the " absence of the defendant. *Does the trial embrace* " *the final judgment? We think so, unquestionably.* " *The trial has not terminated until the final judg-* " *ment has been entered* and the sentence pro- " nounced. (Hill v. The State, 41 Tex., 255; Gibson " v. The State, 3 Tex. Ct. App., 437.) When was the " final judgment entered in this case? It certainly " was not entered at the term of the court when the " conviction was had, as was decided on a former ap- " peal of this case to this court. The trial of the " case, therefore, was not ended at that term. Can " we hold that the entry of the judgment *nunc pro* " *tunc*, at a subsequent term of the court, in the ab- " sence of the defendant, is a final judgment? If it " is a final judgment, is it not a part of the trial, and " if a part of the trial, must not the defendant be " present when it is rendered? If there was before " no final judgment, there could be no valid sentence, " and there could be no valid sentence following " upon the *nunc pro tunc* judgment, for the reason " that the defendant was not present to receive t " sentence. It was not only necessary to have a fin " judgment properly entered against the defendant, " but it was also necessary to follow this judgment " with the sentence of the law, which could not be " done until there was a valid judgment.

"We can find no authority in the law for entering " any judgment in a felony case in the absence of the " defendant. The defendant is guaranteed the right " of appeal from the final judgment entered against

" him. How can he avail himself of this right unless " he is present in open court when the judgment is " rendered? He may have good reasons to show " why the sentence of the law shall not be pronounced " against him, or he might have good reason to show " to the court why the judgment should not be en- " tered against him *nunc pro tunc;* but he cannot " avail himself of these legal rights when he is not " allowed to be present in court. He cannot appeal " to this court except from a valid final judgment; " and when such jujdgment is entered *nunc pro tunc,* " then the defendant has the right to appeal there- " from to this court. (Smith v. The State, 1 Texas " Ct. App., 408, and authorities there cited.)

" We conclude that the proceedings in this case, " attempting to enter a final jujdgment *nunc pro* " *tunc,* in the absence of the defendant, were unwar- " ranted by law, and are absolutely void, and that " there has not yet been any final judgment entered " in this case against this defendant from which he " can appeal to this court, and that this appeal must " be dismissed. It is certainly a very great hardship " upon the defendant that, without fault on his part, " he must be still denied a hearing upon the merits of " his case before the court of last resort. But we " cannot bend the rules of law to the relief of the un- " fortunate defendants. The principle upon which " we dismiss this appeal is one too vital to the rights " of the citizen to be disregarded in any case.

" The counsel of defendant, in their brief, say, in " respect to the question we have decided, that un- " less its materiality is such as to reverse the case, " the defendant waives the point, if he can do so, as " he does not want the case sent back for sentence " to be passed, but prefers that the case be decided " on its merits. We are of the opinion that this " waiver cannot be entertained by us for two reas- " ons: first, because this court has no jurisdiction " over the case until there has been a final judgment " entered, and consent of parties cannot confer juris- " diction; and, second, because if the error be such " an one as could be cured by the waiver of the de- " fendant, the waiver would have to be made by him- " self, and not by his counsel."

The contention made by the majority of the Court of Criminal Appeals in the present case, is to the effect that the trial court would have had authority to enter a judgment *nunc pro tunc* in this case, and that there is no sufficient reason why the Court of Criminal Appeals should not exercise such authority. The case above cited, however, not only demonstrates the reason why the Court of Criminal Appeals could not exercise such authority, that reason being, in addition to a lack of inherent jurisdiction, that the defendant was not required to be, but in the nature of things could not be, present when his case was disposed of in the Court of Criminal Appeals; but it further demonstrates the proposition that the lower court, which has, under the law, unquestioned jurisdiction and authority to enter such judgment *nunc pro tunc,* cannot do so in the absence of the defendant.

The authorities above cited clearly sustain the proposition that it is not due process of law to render a judgment of conviction of a felony in the absence of the defendant.

In the case of Schwab v. Berggren, cited above, it was held that the fixing of the date for execution by the Supreme Court was not the rendition of a judgment of conviction, and was not the sentence in the case, but the authorities cited and the reasoning followed in that case are conclusive upon the proposition here submitted, that is, that in a felony case it is an essential element of due process of law that the defendant should be present at the time when the judgment of conviction is rendered against him. The authorities cited show that this is part of the *"trial"* at which, under the common law, the defendant has always been entitled to be present.

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The Federal questions were sufficiently raised by being presented in a motion for rehearing, which motion was considered and overruled by the court.

Authorities.

Mallett v. North Carolina, 181 U. S., 590; 45 L. Ed., 1015.

Conclusion.

It is respectfully submitted that the judgment of the Court of Criminal Appeals should be reversed, with instructions to that court to set aside its judgments in this cause, and dismiss the same, because of lack of jurisdiction.

Respectfully submitted,

Thos. H. Ball

Sam'l Streetman

Attorneys for Wm. McCorquodale, Plaintiff in Error.

ANDREWS, BALL & STREETMAN,
Of Counsel.

Office Supreme Court, U. S.
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Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 38.

WILLIAM McCORQUODALE, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

BRIEF OF DEFENDANT IN ERROR, THE STATE OF TEXAS.

R. V. Davidson

Attorney General.

Felix J. McCord

Assistant Attorney General.

For the State of Texas, Defendant in Error.

VON BOECKMANN-JONES CO., PRINTERS, AUSTIN

20-1108-50

Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 253.

WILLIAM McCORQUODALE, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

BRIEF OF DEFENDANT IN ERROR, THE STATE OF TEXAS.

Now comes the State of Texas, through R. V. Davidson, Attorney General, and Assistant Attorney General, Felix J. McCord, and moves this Honorable Court to dismiss the petition for a writ of error for that there is no Federal question involved in this case.

STATEMENT.

From an inspection of the record in this case it will be found that the plaintiff in error was indicted by the grand jury of the district court of Brazos county, Texas, for the murder of one Henry Spell, which indictment was returned into court on March 10, 1905. At the same term of court he was brought to trial, which trial resulted in his conviction of murder in the first degree with a life sentence in the penitentiary. From this conviction he appealed to the Court of Criminal Appeals of the State of Texas, which said judgment of conviction was in all things affirmed by said Court of Criminal Appeals of the State of Texas on December 20, 1905. A motion for rehearing was filed and the same was by the Honorable Court of Criminal Appeals of the State of Texas overruled on March 24, 1906. On March 31, 1906, the State of

Texas, through her then Assistant Attorney General, filed a motion in the Court of Criminal Appeals of the State of Texas to reform the judgment of the court below, said judgment failing to pronounce judgment upon the verdict of the jury, which said motion was granted by the Court of Criminal Appeals of the State of Texas, and on November 21, 1906, the State's motion was granted and the judgment of the lower court so reformed as to carry out in the judgment the adjudication of the court on the verdict as returned by the jury. (See Tr., pp. 34-35.) From this order plaintiff in error has sued out a writ of error to this courts on the ground that the Court of Criminal Appeals of the State of Texas had no authority to reform the judgment of the court below and that the same was a trial without due process of the law of the land, and the Court of Criminal Appeals of the State of Texas held, under the provisions of Article 904, Code of Criminal Procedure of the State of Texas, that the Court of Criminal Appeals had jurisdiction and authority to reform and correct a judgment as the law and the nature of the case may require. (See opinion of the Court of Criminal Appeals, Tr., p. 35, and authorities there cited.)

The State of Texas insists that there is no Federal question involved in this case, and submits this proposition.

Proposition I.

When the highest court in the State has passed upon and construed a statute of that State and adopted a mode of procedure, the construction placed thereon by the highest tribunal in a given State is conclusive on this court, both as to the validity of the statute and its constitutionality under the State law, and that this court will not go behind the construction placed upon the statute by the State court, and that the same is not reviewable by the Supreme Court of the United States on writ of error.

Remarks.

If we are correct in the above proposition, it follows that the highest tribunal of the State of Texas having passed upon this provision of the statute and the mode of procedure as measured by the Constitution of the State of Texas this court is not called upon to revise the action of the State court in this respect, and that no Federal question is involved in the case. As was said by

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this court in the case of Layton vs. State of Missouri, 187 U. S., 356, that "An objection raised in the State court that a State statute is unconstitutional and void relates only to the power of the State Legislature under the State Constitution, and raises no Federal question which will give the Supreme Court of the United States jurisdiction to review a judgment of the State court sustaining the validity of the statute." See also to the same effect Kipling vs. Illinois, 107 U. S., 182; Leper vs. State of Texas, 139 U. S., 462.

PROPOSITION II.

By the Fourteenth Amendment to the Constitution of the United States the powers of the State in dealing with crimes within their borders are not limited, except that no State can deprive particular persons or classes of persons of equal and impartial justice under the law. That law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied, and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributed justice.

AUTHORITIES.

In Re Duncan, 139 U. S., 446; Rogers vs. Peck, 199 U. S., 89; Allen vs. Georgia, 106 U. S., 138; Brown vs. N. J., 175 U. S., 172, and in Rogers v. Peck, supra, this court says: "The reluctance with which this court will sanction Federal interference with a State in the administration of its domestic laws for the prosecution of crime has been frequently stated in the deliverance of the court upon the subject. It is only where fundamental rights specially secured by the Federal Constitution are invaded that such interference is warranted." And as was said in the case of Wilson vs. N. C., 169 U. S., 586: "Due process of law guaranteed by the Fourteenth Amendment does not require the State to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." Defendant in error, therefore, insists that no provision of the Fourteenth Amendment to the Constitution of the United States has been violated; that due process of the law guaranteed by said

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amendment has been observed in this case and that no Federal question is involved; and, second, that the highest judicial tribunal of Texas and the court of last resort having construed the statutes of Texas and the procedure under her Penal and Criminal Code and the construction therein placed does not violate any right of the plaintiff in error, and that this court will adopt the construction made by the Court of Criminal Appeals of Texas on its practice and procedure.

Wherefore the States moves that this writ of error be dismissed. But in case this court should hold that it is not proper to dismiss the writ of error, then defendant in error prays that this brief may be considered by the court on the merits of the case, and respectfully asks that the case be affirmed.

Respectfully submitted,

R. V. Davidson

Attorney General.

Felix J. McCord

Assistant Attorney General.

For the State of Texas, Defendant in Error.